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CONFLICT, CRISIS AND CONFUSION IN NEW YORK

BRAINERD CURRIE*

IN RECENT YEARS the New York courts have been making conspicuous efforts to find a new and better approach to problems in the conflict of laws. These efforts have certainly been made with the best intentions; yet they have been halting and uneven. There has been no clear break with the past. The cause of certainty and predictability has not been advanced; on the contrary, vague tests have been subjectively applied, so that the dominant impression is one of confusion. And now one of the most important and promising of New York's efforts has been successfully challenged on constitutional grounds. A crisis of sorts is thus created; for if efforts like those of New York are proscribed by fundamental law, there is little hope for substantial progress in the analysis of conflict-of-laws problems. New York has been groping for a principle that will inform and direct its efforts to find new and more satisfying solutions, and at the same time be consistent with the Constitution. Does such a principle exist? I believe it does. The principle is that New York may and should apply its own laws to effectuate its own legitimate interests, defined with moderation and restraint in the light of the interests of other states.

I

WRONGFUL DEATH—KILBERG

By now almost everyone knows about *Kilberg v. Northeast Airlines*;¹ and almost everyone who knows about the case has his own opinion of it.

* William R. Perkins Professor of Law, Duke University. The author is indebted to Mr. Girard E. Boudreau, Jr., of the Class of 1964, Duke University Law School, for valuable assistance in the preparation of this paper.

¹ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Mr. Kilberg, a resident of New York, purchased a ticket from Northeast Airlines for a flight from New York to Nantucket, Massachusetts. He boarded the aircraft at La Guardia Airport; it crashed and burned at Nantucket, killing twenty-three of those on board.² Kilberg's administrator sued Northeast, a Massachusetts corporation, in the Supreme Court of New York, setting forth in his first count a claim under the Massachusetts death statute. Because that statute limited recovery to a maximum of \$15,000, a second count was added, in which full indemnity³ was demanded on the theory that the defendant had failed to perform its contractual obligation to transport him safely. This rather novel characterization was not without support in precedent. For example, when a railroad passenger sued for injuries sustained in Pennsylvania, and the defense was that Pennsylvania law limited recovery to \$3,000, the New York court had treated the case as one arising from the contract of carriage, and held New York law applicable.⁴ Relying on that decision, the trial court denied a motion to dismiss the second count. The Appellate Division reversed,⁵ and the Court of Appeals affirmed this rejection of the contract theory. Such free-wheeling characterization encounters conceptual difficulties in cases of wrongful death as distinguished from simple personal injury: the cause of action is purely statutory, and the precedents are clear that the applicable law is that of the place of wrong. The second count must be dismissed, leaving only the count based on the Massachusetts statute.

The Court of Appeals did not stop there, however. The plaintiff's recovery was not necessarily limited to \$15,000 by the Massachusetts statute. It would be anomalous if the New York citizen's protection against wrongful death were to vary as the aircraft moved from state to state, and in accordance with the fortuitous place of the crash. Since 1894 the Constitution of New York has prohibited statutory limitations on the amount of recovery for wrongful death, thus declaring a strong policy against such limitations. Moreover, it was "open" to the New York court, "particularly in view of our own strong public policy as to death action damages, to treat the measure of damages as being a procedural or remedial question controlled

² For an account of the accident see N.Y. Times, Aug. 17, 1958, § 1, p. 1, col. 4.

³ "[L]oss of accumulations of prospective earnings of the deceased." 9 N.Y.2d at 38, 172 N.E.2d at 527, 211 N.Y.S.2d at 134.

⁴ Dyke v. Erie Ry., 45 N.Y. 113 (1871).

⁵ Kilberg v. Northeast Airlines, 10 App. Div. 261, 198 N.Y.S.2d 679 (1960).

by our own State policies.”⁶ Therefore, while the judgment dismissing the contract count must be affirmed, the first count stood in a new light: “[The] first count declaring under the Massachusetts wrongful death action is not only sustainable but can be enforced, if the proof so justifies, without regard to the \$15,000 limit. Plaintiff, therefore, may apply if he be so advised for leave to amend his first cause of action accordingly.”⁷

Judge Fuld concurred in the affirmance of the judgment dismissing the contract count, but would go no further: the question of the damages recoverable under the first count was not presented by the appeal, and had not been argued by counsel. As to the merits, he would favor application of the New York law of wrongful death as the law of the state having “the most significant contact or contacts,”⁸ were this approach not foreclosed by precedent. Judges Froessel and Van Voorhis also concurred in the judgment of affirmance only, protesting against the discussion of the amount recoverable under the first count. Unlike Judge Fuld, however, they vehemently protested on the merits against the holding that the \$15,000 limitation of the Massachusetts statute was inapplicable, going so far as to express “grave doubts as to the constitutionality of the majority view.”⁹

Since such a pothole has been raised about the propriety of the court’s dealing with the first cause of action, when the appeal was addressed only to the second, it may be well to discuss that matter first. The judges in the minority were not alone in their objections. The distinguished editors of a leading casebook have adopted the unusual course of informing the student that the holding on this score was “dictum.”¹⁰ If the purpose is to warn the student that the holding is not authoritative, and cannot be relied on as the law of New York, this is hardly a helpful service, since it seems clear that the majority of the Court of Appeals will continue to adhere to this position unless and until it is definitively held unconstitutional. When a panel of the United States Court of Appeals for the Second Circuit was called upon to ascertain the New York law in the com-

⁶ 9 N.Y.2d at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

⁷ *Id.* at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 138.

⁸ *Id.* at 45, 172 N.E.2d at 531, 211 N.Y.S.2d at 140.

⁹ *Id.* at 46, 51, 172 N.E.2d at 532, 535, 211 N.Y.S.2d at 141, 146.

¹⁰ CHEATHAM, GOODRICH, GRISWOLD & REESE, CASES ON CONFLICT OF LAWS, SUPP. TO 4TH ED. 46 (1961). Normally casebook editors leave it to the student to distinguish between dictum and *ratio decidendi*.

panion case of *Pearson v. Northeast Airlines*, the majority referred to this aspect of *Kilberg* as "dictum" no less than seven times.¹¹ Whatever the purpose,¹² it was certainly not to raise a doubt as to the authoritative character of the holding as a statement of the law of New York. The federal court of appeals, recognizing that the district court in New York, sitting in a diversity case, was bound under *Erie R.R. v. Tompkins*¹³ and *Klaxon Co. v. Stentor Electric Mfg. Co.*¹⁴ to follow New York conflict-of-laws rules, indicated not the slightest doubt that *Kilberg* stated the law of New York for this purpose.

What, then, was so censurable about the majority's action in passing on the first count? True, the narrow question on the appeal was whether the second count should be dismissed. True, also, as Judge Fuld emphasized, the question of disregarding the Massachusetts limitation while proceeding under the first count had not been briefed or argued. But the substantial question was whether the plaintiff was to be limited to a maximum recovery of \$15,000. We can be sure that neither party really cared whether, in the abstract, an action in contract could be maintained; that was important only as a means of avoiding the Massachusetts limitation. This being so, what was the court to do when it reached the conclusion that the contract theory would not wash, but that the limitation could and should be avoided even under the tort theory of the first count? Does due process require that the court withhold this information from plaintiff's counsel, remanding the case so that—if they happen to think of it—they can agonize over whether it is worth while to amend the complaint and seek full indemnity under the Massachusetts statute, thus precipitating another round of appeals? If the idea that has commended itself to the majority of the court does not occur to counsel, or if they judge the chances of its success too remote, the plaintiff's right to adequate compensation is defeated. Justice hardly requires such a result. The only meritorious criticism of the court's action seems to be that of Judge Fuld, that the question was not briefed or argued; but we may be sure that there was full discussion of the question whether the Massachusetts limitation could be avoided on *some* theory. That the argument did not embrace

¹¹ 307 F.2d 131, 132, 133, 134, 136 (2d Cir. 1962).

¹² "We think it inappropriate for this court to discuss the wisdom or the soundness of the majority's dictum, and there is no necessity of our doing so." *Id.* at 133.

¹³ 304 U.S. 64 (1938).

¹⁴ 313 U.S. 487 (1941).

the particular theory adopted by the court seems rather unimportant. Apart from this point, the criticism of the court's action as a matter of procedure smacks too much of the formalities of the common law. In the twentieth century it is anachronistic to complain because a court tells a litigant that though he cannot recover in contract he may in tort, or that though he cannot recover in trespass he may in an action on the case. Or does the theory that a lawsuit is a battle of wits between opposing counsel still prevail?

On the merits the holding that the Massachusetts limitation should be disregarded was certainly unconventional. It had two aspects, each highly vulnerable to traditional criticism and provocative of attack on constitutional grounds. The proposition that the measure of damages is a matter of procedure governed by the law of the forum is in conflict with overwhelming authority; and, indeed, once one concedes that for some reason the rights of the parties are governed by the law of a foreign state, it is difficult to justify rejection of the foreign law as to the measure of damages. Ordinarily, at least, application of that law will not cause inconvenience, nor does the corresponding law of the forum relate to policies of judicial administration. In fact, the New York Court of Appeals has since felt constrained to withdraw this ground of its decision in *Kilberg*.¹⁵

The remaining ground for the decision is similarly vulnerable to traditional criticism. Impressive judicial names can be invoked in support of the proposition that, while "local public policy" may justify a court's refusing to entertain a cause of action based on foreign law, it cannot properly justify rejection of a defense based on the foreign law. Thus Mr. Justice Brandeis:

But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Insurance Co. v. Dick*, 281 U.S. 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.¹⁶

¹⁵ *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

¹⁶ *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

And Mr. Justice Holmes:

It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.¹⁷

Despite the eminence of Justices Brandeis and Holmes, this reasoning involves a subtle fallacy, as we shall see. And despite the vulnerability of the *Kilberg* reasoning to traditional criticism, the decision reaches a sound result. The question whether a ceiling should be placed on the liability of the wrongdoer who takes human life—like the earlier question, whether such a wrongdoer shall be liable at all—involves a conflict of domestic interests. This conflict has been resolved in different ways by Massachusetts and New York. In Massachusetts the interests of those whose activities create substantial risk of injury and death—specifically, carriers—have been preferred. In New York the interests of the victim and his dependents have been preferred. Prior to 1894 the New York legislature had imposed limitations; but in that year the constitutional convention resolved the conflict in favor of the victim and his dependents, and wrote its policy decision into fundamental law. Legislative restrictions on the damages recoverable were, in the judgment of New York's lawmakers, "absurd and unjust."¹⁸ Rejecting all arguments to the effect that unlimited liability for death "might be the ruin and impoverishment of small corporations, partnerships, and individuals,"¹⁹ the convention declared in favor of fair and just compensation for the pecuniary injuries resulting from death.

It is evident from this debate, and the arguments used, that this amendment was adopted for the benefit of the next of kin of the bread winner,—persons who in fact sustained large pecuniary damage on account of the negligent act which removed the person, and deprived persons dependent thereon of their sustenance, and which was not measured or recompensed by the sum awarded under the limitation.²⁰

Massachusetts decided the policy issue the other way, protecting the interest of the tortfeasor. But *Kilberg* was a citizen of New York.

¹⁷ *Slater v. Mexican Nat'l. R.R.*, 194 U.S. 120, 126 (1904).

¹⁸ Hatch, J., in *Medinger v. Brooklyn Heights R.R.*, 6 App. Div. 42, 46, 39 N.Y. Supp. 613, 616 (1896), quoted in *Kilberg v. Northeast Airlines*, 9 N.Y.2d 39, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961).

¹⁹ *Medinger v. Brooklyn Heights R.R.*, *supra* note 18.

²⁰ *Ibid.*

Why, in such a case, should New York abandon its own policy in favor of the contrary policy of Massachusetts, with its "absurd and unjust" limitation on the liability of the tortfeasor?²¹

It may be interesting to approach this question, as well as the objections to the *Kilberg* decision on the merits, by way of the published comments on the decision. The law reviews in New York were particularly critical. The *Albany Law Review* summed up its discussion of the decision thus:

The results attained by the *Kilberg* decision have some merit in the light of modern means of travel and the consequent frequent movement from one state to another. The disadvantages, however, would seem to far outweigh the advantages. As a matter of policy the amount of damages should not be made dependent upon plaintiff's choice of forum, nor should a defendant be subjected to varying limits of damages for injuries arising out of the same transaction. According to logic and principle, the reparation to be afforded should depend upon the law of the jurisdiction giving rise to the obligation.²²

The *Columbia Law Review*, in a more ambitious and sophisticated critique, said:

The place of wrong rule has certain important pragmatic advantages that favor its continued use. It is relatively easy to apply, since determination of the place of wrong depends on factors that are usually readily discerned and proved. Furthermore, it achieves objectivity in the selection of law, since it is not ordinarily susceptible to the intrusion of local influences or judicial whims. Thirdly, the elements that lend simplicity and objectivity also make the result of choice of law relatively predictable, an important factor in facilitating settlement of tort claims.

....

The Court of Appeals failed to indicate any circumstances in the instant case that could be said to support a finding that New York had a distinctly greater governmental interest than Massachusetts. It seems

²¹ An element of unreality is injected into the discussion by the fact that, on remand, *Kilberg's* administrator did not amend the first count to claim damages in excess of the Massachusetts limit, but accepted less than \$15,000 in settlement. See *Pearson v. Northeast Airlines*, 307 F.2d 131, 132 n.3 (2d Cir. 1962). This appears to have been because *Kilberg* was a young man with no dependents at the time of his death. Thus the *Kilberg* decision was of no help to the plaintiff in the *Kilberg* case; his hope of recovering more than the maximum was based on the belief that loss of accumulations of prospective earnings was the appropriate measure of damages on the contract theory. But under the wrongful-death theory the measure of damages was pecuniary loss to dependents. Letter from Lee S. Kreindler, Esquire, counsel for plaintiff in the *Kilberg* case. The issue is not always so academic: in the *Pearson* case, to be discussed in Part II, *infra*, the jury's verdict was for \$133,943.77. *Id.* at 132, 137.

²² 25 ALBANY L. REV. 313, 317 (1961).

clear that the significant territorial interests in the case were those of Massachusetts, and in view of the defendant's domicile in Massachusetts, the decedent's domicile in New York did not create a dominant counter-vailing interest in the latter state. Therefore, it is doubtful that this was a proper case for departure from the place of wrong rule.²³

The *New York University Law Review* concluded:

Possible constitutional issues aside, the *Kilberg* dictum represents an unsound choice of law. . . .

....
Whatever may be said of the legal reasoning contained in the *Kilberg* opinion, it is undeniable that the majority kept faith with the prevalent policy against limitation of damages, as expressed in the New York constitution. Bearing in mind that the place of an airplane crash is completely fortuitous, the result, in terms of this policy, seems to be just. A \$15,000 limitation (or any limitation at all) is an unreasonable standard by which to measure the lives of all human beings. On the other hand, to classify damages as procedural opens the way to forum-shopping. The plaintiff, by choosing the forum, is able to control which law will be applied. The *Kilberg* court thus defeats one of the objects of the law of conflict of laws, namely, uniformity of result wherever suit is brought.²⁴

The *Syracuse Law Review* in a brief note said:

To accept a statutory cause of action yet disregard its limitations evidences a retreat from general conflict of laws principles. The court appears to have been affected by that group of legal theorists who advocate that most choice of law problems be solved by application of the forum's internal law. The purpose of a conflict of laws system is to preclude a variance in the outcome of lawsuits according to the place where the action is brought. The decision of the instant case if followed by other jurisdictions would frustrate this purpose. . . .²⁵ . . .

Outside New York there was also adverse comment, though that of the *Georgetown Law Journal* was somewhat ambivalent:

The subterranean rationale disclosed by this effort is clearly the court's legitimate wish to provide relief for persons in whom New York has a strong interest, not only as their prospective guardian, but equally as the public power concerned with the social and economic well-being.

²³ Comment, 61 COLUM. L. REV. 1497, 1509, 1511 (1961).

²⁴ Comment, 36 N.Y.U.L. REV. 723, 727, 729-30 (1961). Surprisingly, the comment goes on to suggest, as a possible solution of the difficulty, that New York adopt the "contract approach" of the second count by statute. *Id.* at 730.

²⁵ 12 SYRACUSE L. REV. 395, 397 (1961). The theorists cited were Cook, Currie and Ehrenzweig. The comment rather oversimplifies the theory of at least one of these, and I should think of all three.

of all its citizens. Whether such admirable motivation must always be implemented by decisions marred by a provincialism which hampers the growth of nationally uniform conflict-of-laws rules remains unanswered. It simply always has been. One alternative response to situations such as that posed by *Kilberg* lies with New York frankly reversing itself and...giving extraterritorial effect to its own wrongful death statute....²⁶

The *Rutgers Law Review* was less restrained. Under the headline, "Misuse of Substance-Procedure and Public Policy Concepts," it pronounced:

This view tends to negate both the rationale of certain conflict of laws rules and the reason for their existence—namely, to prevent the outcome of a lawsuit from differing according to the place chosen to institute the suit. Conflict of laws rules are not mere rubrics without reason to be manipulated by courts so as to achieve a solution to a valid choice of law problem which satisfies their own notions of justice and public policy. In the interests of continued stability and usefulness of conflict of laws rules, it is hoped that this virtually unique decision will remain unique.²⁷

The *Virginia Law Review*, after quoting Cardozo (another great judge, be it noted) on the yielding of the theory of the statute personal to principles of the territorial system and the doctrine of vested rights,²⁸ and after some worried comments about forum shopping, concluded:

At the very least, it seems clear that whatever benefit the instant court has performed for its own citizens, it has by reviving and giving vitality to an old and discarded rule, undermined the certainty which was the legacy of the stable pattern of conflict of law rules which had developed in this area over the years.²⁹

For the purposes of this discussion no such detailed survey of the favorable reaction is necessary. The outstanding law-review comments are those in the *University of Chicago Law Review*³⁰ and the *Harvard Law Review*.³¹ Other generally favorable comments are cited in the footnote.³² The present purpose is to examine the adverse reaction to the decision.

To some extent, not adequately reflected in the excerpts that

²⁶ 49 GEO. L.J. 768, 773-74 (1961).

²⁷ 15 RUTGERS L. REV. 620, 624 (1961).

²⁸ 47 VA. L. REV. 692, 696 n.27 (1961).

²⁹ *Id.* at 697.

³⁰ 28 U. CHI. L. REV. 733 (1961).

³¹ 74 HARV. L. REV. 1652 (1961).

³² EHRENZWEIG, CONFLICT OF LAWS 552-56 (1962); 15 ARK. L. REV. 187 (1961); 41 B.U.L. REV. 257 (1961); 27 BROOKLYN L. REV. 336 (1961); 49 CALIF. L. REV. 187

have been quoted, the opposition is motivated by fidelity to the principles of territorial jurisdiction and vested rights. In part it is motivated simply by the unconventionality of the decision, by the shock that comes with discovery that rules that have been taught, learned, and hardly questioned cannot be trusted. In part it is a reaction against the court's manipulation of traditional concepts, as opposed to a forthright application of New York law, to achieve a desired result forbidden by the traditional system. Passing these matters, passing also criticisms addressed to the procedural characterization, since withdrawn by the court,³³ and considering only the pragmatic arguments advanced by the critics, we find a common concern for the simplicity, uniformity, certainty, and predictability that have been advertised over the years as the significant values of the traditional system of conflict of laws.

To this position certain concessions must be made. Specifically, if we assume that all states will agree that the law of the place of injury governs on substantive matters of tort liability; and if we assume that all states will concur in characterizing the problem, in cases of the *Kilberg* type, as one of tort (rather than, say, one of contract); and if we assume that all states will concur in characterizing the measure of damages as a matter of substance rather than as one of procedure; and if we assume that no state would reject the law of the place of injury on grounds of local public policy; then the following propositions must be conceded:

1. The applicable law is ascertained with comparative ease, since the locality test is relatively (though not always) simple to apply.

2. All victims of the crash would be treated alike, in the sense that the same standards would be applied to determine the right to recover and the measure of recovery.

3. The result in a particular case would not vary according to where the action is brought (subject to valid exceptions concerning procedure, based on convenience of trial and considerations relating to judicial administration); thus the incentives for forum-shopping would be minimized.

4. After the accident has happened, the outcome of each indi-

(1961); 46 CORNELL L.Q. 637 (1961); 30 U. CINC. L. REV. 511 (1961); 15 VAND. L. REV. 271 (1961).

For an unclassifiable comment see Keefe, 48 A.B.A.J. 971; *id.*, 48 A.B.A.J. 491, 498-94 (1962).

³³ See note 15 *supra*.

vidual case would be reasonably predictable, since the body of applicable law is then known; and this would facilitate settlements.

All this is true. But what the commentators on *Kilberg*—like most commentators on the conflict of laws—overlook is that these same values would be realized if the rule were that substantive matters of tort liability shall be governed by the law of Alaska. (The reader may substitute the District of Columbia, or Mississippi, or Rwanda, or Burundi, or any other state, *ad libitum*.) Indeed, such a rule would realize these values even better than the rule that the law of the state of the wrong governs. While the state of the wrong is determined with relative ease, it is sometimes difficult to determine, as where the wrongful conduct and the injury occur in different states, or where the injury is to an intangible interest such as the interest in reputation. All such problems would be avoided if we could agree in advance that the law of a named state, such as Alaska, would govern. All victims would be treated alike, as under the place-of-wrong rule; the result would not vary according to where the action is brought, and forum-shopping would be minimized. As for predictability, the Alaska rule would have an enormous advantage over the place-of-wrong rule; for the outcome of each case would be reasonably predictable not only after, but also before, the accident. Let those who are concerned about the expectations of the parties, and about planning for business enterprises, and about insurability³⁴ reflect upon this. Would it not be to the advantage of both the passenger and the airline to know in advance, before any crash occurs and, indeed, before any flight plan is filed, that all claims for injury and death will be governed by the law of Alaska? The text of that law could even be posted in airport waiting rooms, alongside the insurance-vending machines, as the laws on innkeepers' liability are posted inside the door of a hotel room.

Why, then, if these values, or ideals, are so important, do we not adopt the Alaska type of rule so as to achieve them more fully? Our friends the critics of the *Kilberg* decision, impatient with what they would doubtless regard as unseemly trifling with serious matters, would reply: Naturally, because the applicable law must have something to do with the case, and Alaska obviously has nothing to do with

³⁴ See EHRENZWEIG, *CONFLICT OF LAWS* (1962), *passim*. Cf. MORRIS, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

the *Kilberg* case.' But it is not impertinent to inquire: Why must the governing law have something to do with the case? Certain pragmatic values of the traditional system have been cited; those values can be attained as well or better by a rule referring to the law of Alaska. Why then should we insist on a connection between the state of Alaska and the *Kilberg* case?

The "pragmatic" virtues of the rule referring to the law of Alaska are quite independent of the content of that law. Yet that law must express some sort of policy; like other states, Alaska has had to resolve the internal conflict of interests that England resolved in Lord Campbell's Act.³⁵ One purpose, at least, of a conflict-of-laws system is, or should be, to effectuate the policies of the states concerned; but if Alaska has no relation to the parties, the events, or the litigation, its policy—its resolution of the internal conflict of interests—is irrelevant. Therefore the rule that the law of Alaska shall govern is unacceptable, despite its superior pragmatic values. But it is equally true that any rule must be rejected, despite its pragmatic values, if the state whose law is thereby invoked has no interest in the application of its policy. One of the drawbacks of the place-of-wrong rule is that it sometimes—though perhaps less often than some other choice-of-law rules—commands application of the law of a state having no more concern with the matter than Alaska has with the *Kilberg* case.³⁶

The rule would not operate in quite that irrational way in *Kilberg*. Massachusetts was related to the case in a way significant for the application of Massachusetts policy. This is not evident, however, from the mere fact that the injury occurred there. It does not suffice to say:

When wrongful conduct and injury, or either of them, occur within the territorial confines of a state, that state usually has a clear and significant interest in having its law applied to litigation that may result from such events. This interest arises from the right and duty of the sovereign to protect those within its borders from injury to person or property and, correspondingly, its prerogative to permit individuals to

³⁵ 9 & 10 Vict. c. 93 (1846).

³⁶ See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), discussing *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), which rejects the law of the place of the wrong with respect to the question whether a claim for personal injuries survives the tortfeasor. In the circumstances, the policy of the state of the wrong was irrelevant.

engage in certain kinds of conduct, within constitutional limits, without incurring liability.³⁷

It is true that the state of wrongful conduct or injury normally has an interest in applying certain of its policies: *e.g.*, an interest in deterring dangerous conduct, and an interest in requiring reparation, if not primarily for the victim, at least for the protection of those who go to his aid. In cases of wrongful death as distinguished from simple injury, however, it may be that the state has not declared the policy that must underlie such an interest. If the Northeast Airlines crash had occurred in a state having no other connection with the parties, the events, or the litigation, and having a statute more closely resembling Lord Campbell's Act than the Massachusetts statute does, it would be difficult to find such a policy. The more typical statute provides for recovery only if the deceased is survived by certain classes of beneficiaries who suffer pecuniary loss, and the proceeds of recovery are not subject to claims of creditors of the deceased or his estate. Hence the statute declares a policy of deterring wrongful conduct only imperfectly, and declares no policy at all for the protection of local creditors. In such a case application of the law of the place of injury may be so unwarranted as to constitute a denial of full faith and credit to the laws of the state having a genuine interest in the matter, and the United States Supreme Court has so held (though not in just these terms).³⁸ The Massachusetts statute is different. More clearly than the typical wrongful death act, it expresses a policy of deterring dangerous conduct: there is a minimum as well as a maximum recovery; the damages are measured not by pecuniary loss but by the degree of the defendant's culpability;³⁹ if there is no surviving spouse or issue, the proceeds go to the next of kin;⁴⁰ and the proceeds are expressly made subject to claims for funeral expenses, medical and hospital expenses, and reasonable attorney's fees incurred in their recovery.⁴¹ Thus Massachusetts has an interest in the application of *certain aspects* of its law merely because the wrongful conduct and the injury occurred there. But with respect to these matters there is no obvious conflict of interest between Massachusetts and New York, at

³⁷ Comment, 61 COLUM. L. REV. 1497, 1510 (1961).

³⁸ Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), discussed in Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 23-30 (1961).

³⁹ MASS. ANN. LAWS ch. 229, § 2 (1955).

⁴⁰ MASS. ANN. LAWS ch. 229, § 1.

⁴¹ MASS. ANN. LAWS ch. 229, § 6A.

least in the context of *Kilberg*; to award the plaintiff more than \$15,000 will tend to reinforce, rather than to frustrate, the Massachusetts policies of deterring wrongful conduct and protecting creditors.⁴² This is a perhaps overly complex way of stating a proposition so simple that it ought to be obvious: it is a *non sequitur* to say that, because, by virtue of being the place of the wrong, Massachusetts has an interest in deterring wrongful conduct and in securing the payment of local creditors, Massachusetts also has an interest in limiting the liability of the defendant.

Yet the passage from the *Columbia* comment just quoted⁴³ appears to set forth precisely this nonsequitur. Either that, or it sets forth another quite unacceptable proposition: that because of territorial principles the sovereign has the "prerogative to permit individuals [whoever they may be] to engage in certain kinds of conduct [within the territory], within constitutional limits, without incurring liability." Despite the absolutist sound of this manifesto, I shall assume that there is no intention to suggest that the state where the conduct occurs has *exclusive* power to determine its consequences. Otherwise we should be confronted with the rather unpalatable proposition that Massachusetts could repeal its wrongful death statute entirely, thus conferring on all and sundry a license to kill with impunity in Massachusetts—a license that must be respected by all other states, no matter who the victim may be. The kind of thinking that might support such an extreme proposition is happily extinct in responsible quarters.⁴⁴ I take it, therefore, that the comment means to suggest only that the state where conduct occurs has *an interest* in insulating the actor from liability for conduct that it approves or condones, not that it has the sole voice in the matter. But the proposition is unacceptable even with this limitation. Let us assume that it is the policy of a certain state that

⁴² In another context, however, conflict is conceivable. Since New York law provides for no minimum recovery and measures recovery solely in terms of pecuniary loss, the amount of the judgment may be insufficient, by Massachusetts standards, to implement the deterrent policy.

There appears to be no conflict regarding protection of Massachusetts creditors, since the New York statute seems to provide full protection. See N.Y. DECEDENT ESTATE LAW § 133. Cf. *Re Procopio*, 149 Misc. 347, 267 N.Y. Supp. 908 (1933).

⁴³ At note 37 *supra*.

⁴⁴ For the interment of the philosophy expressed by Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), see *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288-89 (1952), and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-08 (1962).

there shall be no liability, or only limited liability, for wrongful death. In what circumstances will the state have an interest in applying that policy? We need to know more precisely what the policy is. Presumably it is not to encourage people within the state's borders to live dangerously, to practice for the edification of the community the most hazardous skills, sports, and games. Presumably it has some serious purpose. In a law-school classroom we can imagine far-out possibilities: the state wishes to stage, for the increase of its revenues and the edification of its people, a duel to the death between the world's finest swordsmen, who happen to be nonresidents. To be induced to participate they must be given immunity. In such a case the state has an interest in the application of its policy of nonliability for local conduct though the actors are nonresidents. In any realistic setting, however, we are likely to find that the concern of the state is with the people involved rather than the scene of the activity. Thus the American policy of limiting the liability of shipowners is to encourage American investment and enterprise in the shipping industry; the activity, it is hoped, will be world-wide, but the American shipowner will be protected by American courts irrespective of where the activity results in injury.⁴⁵ Similarly, the Massachusetts policy of limiting liability for wrongful death is presumably to encourage socially useful enterprise by relieving entrepreneurs from what the legislature regards as an oppressive risk of liability. It is therefore appropriate, and necessary, to ask: *What* entrepreneurs? And the answer, surely, is: those with whose welfare Massachusetts is concerned; namely, Massachusetts individuals, partnerships, trusts, corporations, and quite possibly foreign corporations doing business in Massachusetts. The Massachusetts interest rests not on the conduct within the state but on the state's concern for the entrepreneur.

This kind of analysis is important in consideration of the assumed case in which the state where the conduct and injury occurred has no other connection with the matter. Such a state, I believe, would have no interest in the application of its limitation provision (assuming a statute like the Massachusetts statute), and to follow the place-of-wrong rule in such a case would be simply indefensible. *Kilberg* is not such a case. Northeast Airlines is a Massachusetts

⁴⁵ See Comment, 1962 DUKE L.J. 259.

corporation, doing substantial business within the state. Massachusetts has a legitimate interest in limiting its liability for deaths occurring in the course of its business. But the foregoing analysis is also relevant to the *Kilberg* case because it is important, in a case of truly conflicting interests, to know just what the interests of the respective states are. It is especially important to know this so long as there are commentators who presume to "weigh" the conflicting interests and choose between them, since the ethereal scales used in this process can be tipped when illusory interests are thrown into the balance. The conflict in *Kilberg* is simple and clear: Massachusetts has a policy of encouraging enterprise by relieving it of the risk of unlimited liability for death; it has an interest in the application of that policy in *Kilberg* because the defendant is a Massachusetts enterprise. Massachusetts has no interest in the application of its *limitation* policy merely because the wrongful conduct occurred there, or because the injury occurred there, or because the death occurred there. New York has a policy of requiring the wrongdoer to provide full indemnity for the death, and has an interest in the application of its policy in *Kilberg* because the victim and his next of kin were residents of New York. New York has no interest in applying its law and policy merely because the ticket was purchased there, or because the flight originated there.⁴⁶ New York's policy is not for the protection of all who buy tickets in New York, or board planes there. It is for the protection of New York people.⁴⁷

⁴⁶ This is recognized in the COLUMBIA comment, 61 COLUM. L. REV. at 1511.

It begs the question to suggest, as the RUTGERS comment, *supra* note 27, apparently does, that choice-of-law rules themselves embody the policy of the state. The question is whether choice-of-law rules intelligently further the specific policies embodied in the state's municipal law. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1007 (1958).

⁴⁷ Some of the comments on the case express concern about the problems of discrimination suggested by this statement. It is not practicable here to consider that somewhat intricate problem. It must suffice to say, first, that the statement in the text does not mean that the benefits of New York law are to be reserved exclusively for New York people; that there are cases in which New York would be required to extend its benefits to others; that there are other cases in which New York might withhold those benefits from others on the basis of reasonable classifications; and that there are, finally, cases in which the extension of those benefits to others would amount to intermeddling rather than altruism, and would be condemned under the Constitution. The subject is discussed in Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960). See also Part II, *infra*.

How, then, is this conflict to be resolved? It cannot be resolved with the resources of the law of conflict of laws. You and I know, of course, which is the better law, which is the sounder policy, which is the more deserving interest. We know that, however, because we are human beings and lawyers-at-large, not because of what we know about the conflict of laws. And we do not make the laws for Massachusetts and New York. The conflict might be destroyed by the legislature of New York, or of Massachusetts, if either were to amend its law so as to withdraw it from application to cases of this type. It might have been avoided if the New York Court of Appeals had construed its law and policy more narrowly. It could be destroyed by an act of Congress, pursuant to the power to regulate interstate commerce, establishing a uniform rule of liability. It could be resolved by an act of Congress pursuant to its power to implement the Full Faith and Credit Clause.⁴⁸ Once the New York court has determined, however, what the New York policy is, and that New York's interest demands application of the policy in this type of case, it is the court's clear duty to apply New York law. Assuming that the Massachusetts court is equally firm in its conception of that state's policy and interest, it must similarly apply its own law to cases that come before it. Neither can properly sacrifice the interest of the state whose creature it is to the conflicting interest of another state, whether this be done outright by a concession that the foreign interest is "paramount," or by a finding that there are more significant "contacts" with the foreign state, or by application of the rule of thumb that the law of the place of wrong controls. Nor can the United States Supreme Court properly choose between the conflicting interests.⁴⁹

The reaction to the *Kilberg* decision makes it clear that there are those who regard this answer as intolerable. Such a conflict must be resolved by the courts somehow; we cannot admit defeat for the conflict-of-laws system. What has become of the values of the system—of simplicity, equality of treatment for the victims of the disaster, uniformity of result regardless of forum, and predictability? But our discussion has indicated that, however much those values

⁴⁸ See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 90-107 (1942), originally published as *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

⁴⁹ See Part II, *infra*.

are to be desired, they cannot be pursued without regard to the interests of the states concerned. Any conceivable choice-of-law rule will subvert the legitimate interest of one state or the other. Which is to be subordinated, and who is to decide? Most of the aggrieved commentators would simply go back to the rule of thumb, whereby the fate of the respective interests is determined by chance: where did the plane strike the ground? The *Columbia Law Review* would do the same, though in its sophistication it would rationalize that course by (1) erecting a presumption, on territorialist principles, in favor of the law of the place of the wrong, (2) appraising the "territorial contacts" and the "domiciliar contacts" of the respective states with the case, and then (3) in its wisdom concluding that New York did not have "a distinctly greater governmental interest" than Massachusetts.

It seems clear that the significant territorial interests in the case were those of Massachusetts, and in view of the defendant's domicile in Massachusetts, the decedent's domicile in New York did not create a dominant countervailing interest in the latter state. Therefore, it is doubtful that this was a proper case for departure from the place of wrong rule.⁶⁰

Those who are concerned for governmental interests may well raise an eyebrow at this cavalier dismissal of the interest of New York. Those who are concerned for simplicity, certainty, and predictability may well be apprehensive about the prospect that the place-of-wrong rule may be displaced by such analysis in the hands of other weigh-masters.

It was suggested earlier that the values claimed for the traditional system of conflict of laws could be attained as well or better by a rule referring to the law of a predetermined state, designated by name. Obviously no one would take seriously such a suggestion if it were offered as a proposal for reform, since it ignores governmental interests entirely. Let us now improve on that device by suggesting another that does take account of governmental interests: the measure of damages in wrongful death cases shall be determined by the law of that state which provides for the greater recovery. (The reader may substitute "more limited" for "greater.") Such a rule would achieve the values claimed for the traditional system even better than the place-of-wrong rule; in addition, it would make

⁶⁰ 61 COLUM. L. REV. at 1511.

a forthright choice between the conflicting policies. What would be its chances of adoption if it were proposed as a substitute for the place-of-wrong rule? Precisely because it does deal forthrightly with the policy conflict, only the most visionary theorist could seriously contemplate a conflict-of-laws system constructed in substantial part on this principle. Perhaps a few such rules could win acceptance, in areas in which courts are disposed for some reason to define domestic interests narrowly;⁵¹ but where the policy of the state is strong and the interest is clear, it is inconceivable that a court would adopt a rule that would sacrifice domestic interests in every case of conflict. How could Massachusetts possibly justify retention of its limitation policy for domestic purposes while proclaiming that in all cases of conflict that policy must yield to the contrary policy of another state? It is too clear that the court is arrogating to itself a legislative prerogative; it is too clear that domestic interests are betrayed.

It seems evident that those who cling to the traditional system of choice-of-law rules are people who place a low valuation on the principle of self-determination. They want life to be as nearly as possible what it would be if there were not a variety of different governments enacting different laws, reflecting different values. They are annoyed because different peoples solve their problems in different ways, because this adds complexity to life. At heart they are probably people of the type who would solve as many problems as possible at the highest political level. The basic conflict of policy involved in *Kilberg* they would probably prefer to deal with on a global basis—and some melancholy progress in that direction has been made in the Warsaw Convention;⁵² they would welcome an act of Congress superseding state laws where interstate air transportation is concerned. They are probably among the strong advocates of uniform state laws. It is not so much that they—the conflict-of-laws traditionalists, that is—believe they have all the right answers. They do not care much what the answer is, so long as it is the same everywhere. They are impatient with the little affairs with which legislators and diplomats concern themselves, and think it does not really

⁵¹ As to the policy against usury, see *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927). Cf. the advocacy of a "basic rule of validation" for choice of law in contract cases. EHRENZWEIG, *CONFLICT OF LAWS* 465 (1962).

⁵² Convention and Additional Protocol with Other Powers Relating to International Air Transportation, July 31, 1934, 49 Stat. 3000, T.S. No. 876 (proclaimed October 29, 1934).

matter much how questions of governmental policy are determined. They want security, simplicity, equality, uniformity, and predictability. They treat these values as near absolutes, to be yielded only in the most exceptional circumstances. They are uncomfortably aware that this is not yet one world, and that perverse legislative bodies will go on provincially adopting conflicting policies; but in their own realm they are determined to pretend that this is not so. They want litigation involving diverse laws to proceed almost exactly as if there were one super-government, so that every case will be decided as if it were a case domestic to such a government: one law must apply; all victims of the crash must be treated alike; any individual case must be decided the same way by any court. So, where they cannot have a treaty or an act of Congress or a uniform state law, they propose a choice-of-law rule—that is, a rule that will designate one state whose law shall be applied by all states. They do not propose that all states apply the law of the state limiting (or not limiting) liability, because no such rule would stand a chance of being accepted; its acceptance requires the overt sacrifice of state interests. Instead they propose a rule that makes no reference to conflicts of governmental interest—a rule, indeed, that ignores even the content of the laws involved. They conceal and suppress the fact that state interests are sacrificed. If the fact is exposed, they tell us that governmental interests are not very important, and extol the values of uniformity. If we persist, they talk about the territorial prerogatives of the sovereign, but not much about what makes one state more sovereign than another. If we point out that the proposed rule does not deal rationally with the conflict of interests, but ignores its existence while letting the result turn on a factor determined by chance, they will shrug in reply. The rule at least avoids discussion of the competing values involved. Agreement on the basic issue is hopeless; hence the law must be made without reference to the values at issue. If we suggest that the rule will subvert state interests in the same way as a rule pointing to the law of limited (or unlimited) liability, they will reply that this is not so; it will subvert the interest of a particular state only half the time. The rest of the time it will subvert the interest of the other state. If we suggest that such a rule displays slight concern for the concept of justice under law, we are told: "The introduction of elements of fairness to individuals affected by the litigation and respect for in-

terests of states other than the place of wrong must, it appears, inevitably jeopardize the attainment of these values"⁵³—the values of simplicity, "objectivity" (meaning the exclusion of "local influences"), and predictability. Hence: "Fairness to the parties would not appear to be a material factor in the [*Kilberg*] case."⁵⁴

In this corner, then, we have the proponents of the traditional system of conflict-of-laws, the most vocal of them law students and their professors. In the far corner we have the recalcitrants, judges like Chief Judge Desmond and the majority of the New York Court of Appeals, who cannot swallow whole a system that disregards state interests and fairness to the parties. As between these groups, who are the practical men, the realists, and who are the "theorists"?⁵⁵

Perhaps we can recognize error in others better than in ourselves. There are countries in which doctrinaire adherence to the arbitrary system of choice-of-law rules and contempt for governmental policy have approached the level of obsession. In order to illustrate the functioning of foreign choice-of-law rules relating to contracts of marriage, Rabel states the following case:

An American citizen domiciled in New York, while temporarily residing in Germany, seduced a German girl by promising to marry her and subsequently repudiated his promise. The German court denied the girl's action, holding that the German conflict of laws rules referred to the law of New York as the personal law of the defendant, under which actions for breach of promise to marry are not recognized.⁵⁶

Rabel states the case without comment;⁵⁷ it is routine, there is nothing remarkable about it. But one who reads his account of this decision without the distorting lenses of the choice-of-law system must be incredulous. Is it possible that a German court could have made such a decision? If so, was it some Nazi aberration? I have seen the report of the decision, and it is no aberration. The holding is that "the consequences of a breach of an engagement to marry are to be determined in accordance with the law of the nationality of the obligor." The foreign law may be rejected on policy grounds only if "the difference between the political or social ideas upon which the German and the foreign law are based is so

⁵³ 61 COLUM. L. REV. at 1510.

⁵⁴ *Ibid.*

⁵⁵ See note 25 *supra*.

⁵⁶ 1 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 219 (2d ed. 1958).

⁵⁷ Except to deplore occasional departures from the rule on grounds of public policy as "obviously arbitrary." *Id.* at 220.

substantial that an application of the foreign law would directly offend against the basic principles of German public or economic life."⁵⁸ The decision has recently been disapproved on the ground that, while the choice-of-law rule is correct "in principle," the German law embodies a policy of protection for women that ought to be applied where the woman is a German.⁵⁹ The latter decision, however, has provoked anguished criticism from the traditionalists, comparable to the criticism of *Kilberg*.⁶⁰

And now the Constitution of the United States is invoked to preserve such a system against such inroads of common sense.

II

FULL FAITH AND CREDIT—PEARSON

The direct challenge to the constitutionality of *Kilberg* came in *Pearson v. Northeast Airlines*, a parallel case arising from the same accident but tried in the United States District Court for the Southern District of New York.⁶¹ Both the district court and the court of appeals recognized that New York conflict-of-laws rules were controlling, and that *Kilberg* authoritatively stated the law of

⁵⁸ Kammergericht, January 11, 1939, reported in [1939] DEUTSCHES RECHT 1012. I am indebted to my colleague, Professor Hans W. Baade, for translating the case and also for calling to my attention as well as translating the case cited in note 59, *infra*, and the critical comments on it.

⁵⁹ S.U. v. K., 28 Entscheidungen des Bundesgerichtshofes in Zivilsachen [Decisions of the Federal (Supreme) Court in Civil Matters] 375 (November 21, 1958).

⁶⁰ "[The decision] also is opposed to long-lasting and constantly repeated attempts to take the exceptional character of public policy very seriously and to exclude the applicability of foreign law only where applying it would be utterly unbearable.... [T]he ideal goal of an international harmony of judicial decisions is threatened by public policy, and... the latter should therefore only be used where there is no other solution. . . . [German courts and authors generally] have disapproved that legal 'Chauvinism' which could sometimes be observed in the theory and practice of other countries and which today seems to be displaced more and more by an increasingly international approach. In this stage of developments, the decision of the German federal supreme court here discussed must give rise to consternation." Dölle, Note, [1959] JURISTENZEITUNG 489, 490. See also Lüderitz, Note, [1959] NEUE JURISTISCHE WOCHENSCHRIFT 1032.

⁶¹ 307 F.2d 131 (2d Cir. 1962), reversing 199 F. Supp. 539 (S.D.N.Y. 1961) and 201 F. Supp. 45 (S.D.N.Y. 1961). The New York Court of Appeals had noticed the constitutional question briefly, remarking that certain older Supreme Court decisions in diversity cases (*Northern Pac. R.R. v. Babcock*, 154 U.S. 190 (1894); *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904)) "do not bring into play the full faith and credit clause," and citing *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 42, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137-38 (1961).

The *Pearson* case is noted in 31 FORDHAM L. REV. 196 (1962).

New York.⁶² The district court did not discuss the constitutional question, but gave judgment for the plaintiff in the amount of \$160,150.65, including pre-judgment interest of \$26,106.88. The court of appeals reversed in an opinion by Judge Swan, Judge Lumbard concurring. Judge Kaufman dissented.⁶³

The holding of the Court of Appeals that *Kilberg* violates the Full Faith and Credit Clause⁶⁴ was rested on *Hughes v. Fetter*⁶⁵ and *First Nat'l Bank v. United Air Lines*.⁶⁶ Those cases do not support the decision. They held only that a state may not arbitrarily close the doors of its courts to actions for wrongful death occurring in another state. That the forum state is not required to subordinate its law and policy to that of the state of wrong was explicitly and clearly stated:

The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted."⁶⁷

*Wells v. Simonds Abrasive Co.*⁶⁸ should have been enough to eradicate any lingering notion that *Hughes* and *United* give any

⁶² See text at notes 13, 14 *supra*. Prior to *Kilberg*, Judge Weinfeld had held, on the basis of the New York law as it then stood, that the only available recovery was that allowed by the Massachusetts statute. *Pearson v. Northeast Airlines*, 180 F. Supp. 97 (S.D.N.Y. 1960).

⁶³ 307 F.2d at 136. The reader will not be surprised to learn that the author of this paper regards Judge Kaufman's opinion as the enlightened one. Despite its excellence, the opinion will not be analyzed here in detail, because the argument to be presented here is so similar. The argument, however, will draw freely upon the opinion.

Judge Kaufman's dissent did not extend to the matter of pre-judgment interest, which involved only ascertainment of the law of New York.

⁶⁴ U.S. CONST. art. 4, § 1.

⁶⁵ 341 U.S. 609 (1951).

⁶⁶ 342 U.S. 396 (1952). The court also cited cases on interstate recognition of divorce decrees to support the proposition that the purpose of the Full Faith and Credit Clause was "to transform an aggregate of independent sovereign states into a nation." 307 F.2d at 133. Thanks to the act of Congress implementing the clause, 28 U.S.C. § 1738, this is very nearly one nation so far as judgments are concerned: the judgment of one state must be honored in all others notwithstanding local policies and interests. *Fauntleroy v. Lum*, 210 U.S. 230 (1908). It is far from being one nation in the sense that every state must defer to the wrongful death statute of the state of injury. The Constitution does not incorporate the RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. Congress has not meaningfully implemented the Full Faith and Credit Clause with respect to public acts. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 82 n.162 (1959); Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 19 (1958).

⁶⁷ 341 U.S. at 612 n.10.

⁶⁸ 345 U.S. 514 (1953).

such broad scope to the Full Faith and Credit Clause as is claimed for it in *Pearson*.

The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.

....

The crucial factor in those two cases was that the forum laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were discriminated against.⁶⁹

The *Kilberg* case did not lay an uneven hand on the out-of-state cause of action. The objection raised against that case, paradoxically, is that it did *not* discriminate against the foreign cause of action, but treated it substantially as a domestic case would be treated. Not only did New York entertain the action, thus avoiding the discrimination against its own residents that was condemned in *Hughes* and *United*; it went further and applied its own law, as those cases clearly permit, thus avoiding the infliction of a further penalty on its own citizens merely because the death occurred outside the state. My own view is that the justifying principle of *Hughes* and *United* is the equal protection of the laws⁷⁰ rather than full faith and credit;⁷¹ but it is not necessary to accept this proposition to understand that those cases do not require New York to apply the law of Massachusetts to measure the substantive rights involved.

Elsewhere I have stated my understanding of the extent to which the Full Faith and Credit Clause bears upon the choice of law by state courts.⁷² The conclusion is simple: The unimplemented clause requires deference to the law of a sister state only when that state has an interest in the application of its policy and the forum state has no such interest; in cases of conflicting interests, such as *Kilberg*, the Constitution does not choose between them. Congress has not exercised its power to determine the choice, and the Court cannot make the choice without assuming a legislative function of a high political order.⁷³ The case analysis that supports this conclusion

⁶⁹ 345 U.S. at 516, 518-19.

⁷⁰ U.S. CONST. amend. XIV, § 1.

⁷¹ See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959). I do not suggest that, in a case of true conflict such as *Kilberg*, New York's refusal to apply its substantive law would be a denial of equal protection, as it may be in a case of false conflict like *Hughes* or *United*.

⁷² Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9 (1958).

⁷³ While this view gives limited scope to the unimplemented clause, and while I am

cannot be repeated here. The following discussion will be limited to the specific constitutional misconceptions that seem to have produced the unfortunate result in *Pearson*. Apart from the excessively broad reading given the *Hughes* and *United* cases, the most serious of these is what I persist in calling the Brandeis fallacy⁷⁴ despite the fact that attributing fallacious reasoning to a justice so rightly venerated is not a tactic calculated to win friends. Fallacy it is, and Brandeis is not the only great judge who has nodded when dealing with the mysteries of the conflict of laws.

The fallacy creeps into the *Pearson* case when Judge Swan (still another great judge) accepts the argument of counsel for Northeast Airlines that there is an "obvious distinction" between *Wells* and *Pearson*:

In *Wells* the plaintiff was not deprived of all remedy; he could sue in any state where defendant could be found and which has a longer statute of limitations than Pennsylvania or follows a different conflicts rule. In our case defendant had no choice as to the forum. If deprived of the protection of the limitation imposed by the law which, as *Kilberg* recognizes, created the liability, he will be treated unjustly.

A defendant is in a different position from a plaintiff who seeks to enforce a cause of action conferred by the laws of another state...⁷⁵

The opinion then quotes the passage from Mr. Justice Brandeis' opinion in *Bradford Electric Light Co. v. Clapper* that was quoted in Part I of this discussion.⁷⁶

There is no denying the seductive appeal of this argument. So long as one conceives that, on territorial principles, the law of the state of injury must govern, and therefore is the sole measure of the rights of the parties, the invocation of local public policy to strike down a defense under that law must logically be disfavored as a provincial and recalcitrant refusal to play the game.⁷⁷ The fallacy

profoundly convinced that the clause has no such function as is claimed for it in *Pearson*, I can only regret Professor Ehrenzweig's continued insistence that the clause has no function at all with respect to the public acts of sister states. See EHRENZWEIG, *CONFLICT OF LAWS passim* (1962); cf. Currie, Book Review, 74 HARV. L. REV. 801, 803-05 (1960).

⁷⁴ See the quotation at note 16 *supra*.

⁷⁵ 307 F.2d at 135.

⁷⁶ See *supra* note 16.

⁷⁷ Even on the basis of that conception there are arguments against the Brandeis position, but since they are perhaps arguments in opposition to the dismissal of foreign-based claims on unsubstantial grounds of local public policy rather than in support of the application of local law where the defense depends on foreign law, they will not be emphasized here, but only stated briefly: (1) The plaintiff's claim is effectively denied if the forum is the only one in which as a practical matter the

appears only when we recognize that the "applicable" law is not in any exclusive sense that of the state of injury, but may be the law of New York to the extent that New York interests are involved and New York is in position to effectuate its interests. The unanimous Supreme Court did recognize this in the later workmen's compensation cases; and Mr. Justice Brandeis himself must have realized the infirmities of his former position, for he indicated no dissent from the opinion of the Court, written by Mr. Justice Stone, in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*,⁷⁸ wherein that position was explicitly rejected:

In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes in conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. . . .

The necessity is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.⁷⁹

plaintiff can sue, and the range of his choice is limited not only by jurisdictional rules but by the doctrine of forum non conveniens. In the *Wells* case itself it may be that the plaintiff could sue only in Pennsylvania. (2) It is not always easy to determine whether the dismissal is on grounds of local public policy or on the merits; if it purports to be on the merits, the plaintiff's freedom to proceed elsewhere is obstructed. (3) In a constitutional system commanding full faith and credit to the laws of sister states, the concept of an "applicable" law that nevertheless need not be applied if it is distasteful to the forum is a contradiction in terms unless the forum has a legitimate interest in the application of its own law and policy. For a fuller discussion see Currie, *supra* note 72, at 28-29.

⁷⁸ 294 U.S. 532 (1935).

⁷⁹ *Id.* at 547. The Court retreated perceptibly from the position that it must "weigh" and choose between the conflicting interests in *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 500 (1939). See Currie, *supra* note 72, at 22.

In *Alaska Packers* the Court sustained the disallowance of a defense based on the assertedly "applicable" foreign law. It did so again in *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n.*⁸⁰ it did so again in *Carroll v. Lanza*;⁸¹ it did so again, in substance, in *Griffin v. McCoach*;⁸² it did so again in *Watson v. Employers Liability Ins. Corp.*,⁸³ with a crystal-clear statement of governmental-interest analysis.⁸⁴ All this should have effectively disposed of the Brandeis position; but it is not alone truth that, crushed to earth, will rise again.

It is not entirely clear what the court of appeals would have said if New York had simply declared, on the authority of these cases, that New York had an interest in the application of its policy and that the plaintiff could recover on the New York statute without reference to the Massachusetts statute. The broad interpretation of the *Hughes* and *United* cases seems to indicate that such an approach would have made no difference. Concerning the powerful authority of *Alaska Packers* and *Pacific Employers* and the inroads there made on the authority of *Clapper*, the court said only: "In our opinion the workmen's compensation cases are distinguishable."⁸⁵ But the New York Court of Appeals, instead of holding its statute applicable, had taken pains to emphasize that the plaintiff must proceed under the Massachusetts statute, and the Court of Appeals for the Second Circuit seized on this fact as if it made a critical difference. "[N]othing in the later [workmen's compensation] cases gives support to the proposition that full faith and credit must give way to a local policy not embodied in a statute which *directly governs* the cause of action."⁸⁶ Mr. Justice Stone's interment of the Brandeis fallacy was

⁸⁰ *Supra* note 79.

⁸¹ 349 U.S. 408 (1955).

⁸² 313 U.S. 498 (1941) (an interpleader case).

⁸³ 348 U.S. 66 (1954).

⁸⁴ *Cf. Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), where the Court gave its approval to the forum's application of its own law and policy to deny a *part* of the claim asserted by the plaintiff under the "applicable" foreign law, thus in all probability precluding the plaintiff from asserting that part of the claim elsewhere.

⁸⁵ 307 F.2d at 136. If this means that the governmental-interest analysis is restricted to such "economic and social" legislation as workmen's compensation, and is inapplicable to "juridical" questions, Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1354 (1960), it is certainly unsound. *Cf. Richards v. United States*, 369 U.S. 1 (1962), the significance of which was apparently lost on the court of appeals. 307 F.2d at 136. Mr. Justice Stone's *Alaska Packers* distinction between tort and workmen's compensation was a device to escape territorialist precedents that would hardly be required today as it was in 1935. See 307 F.2d at 136 n. 7; *cf. Currie, supra* note 72, at 66.

⁸⁶ 307 F.2d at 136. (Emphasis supplied.)

not quoted; but the court seems to be saying that Stone's language must be given the narrowest possible construction: "The necessity is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings *under the local statute*."⁸⁷ In *Pearson* the action is not under the local statute, but under the foreign statute, so the argument seems to go; hence the principle stated by Stone does not apply; it applies only where the local policy is "embodied in a statute which *directly governs* the cause of action."

But such an attempt to retrieve a fragment of the demolished Brandeis fallacy borders on the absurd. Stone was surely stating that the Full Faith and Credit Clause does not forbid a state to apply its own law to effectuate its own policy where it has a legitimate interest in so doing, irrespective of whether the local law and policy are used defensively or as a ground for recovery. So far, at least, as the principal issue of limitation of liability is concerned, it makes no practical difference whatever whether the New York court says that the plaintiff in *Kilberg* is suing under the New York statute or the Massachusetts statute; and surely a state court does not violate the Constitution when it reaches a perfectly sound result but uses language that gives offense to doctrinal purists.⁸⁸

There is one respect in which the outcome of the *Pearson* case is affected by the circumstance that New York held the Massachusetts statute "applicable" instead of applying its own. The New York statute provides for pre-judgment interest; but in *Davenport v. Webb*⁸⁹ the Court of Appeals of New York refused to apply that provision where the death occurred in Maryland, whose law did not allow such interest. Accordingly, the court of appeals disallowed such interest in *Pearson*. More than a vestige of territorialism lurks in *Davenport*, and this circumstance troubles some students, at least; it seems to lend plausibility to the Brandeis fallacy as revived by the court of appeals in *Pearson*. But surely if the right of New York

⁸⁷ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935). (Emphasis supplied.)

⁸⁸ "So even if the state court had rested its conclusions on an improper ground, this Court could not, in view of the undisputed facts establishing its validity, declare a solemn act of the State of New Jersey unconstitutional." *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 284 (1961) (per Black, J.).

⁸⁹ 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

to apply its own wrongful death statute in its entirety is established, as it almost certainly is, then New York has the right to apply less than all of its law on the subject of wrongful death. No principle requires a state to define its interests in the broadest terms possible under the Constitution. *Kilberg* was a case in which the interests of New York were in conflict with those of Massachusetts. New York is entitled to apply its own policy whenever its relationship to the case is such as to make the application of that law a reasonable ordering of its own concerns. It need not, however, ignore the competing interests of Massachusetts and other restraining considerations; in defining the situations in which legislative policy requires that domestic law be applied, it need not be egocentric and provincial but may proceed with enlightenment and restraint in an attempt to achieve an accommodation of interests. *Davenport v. Webb* may be interpreted as a determination by New York not to assert an interest in applying its policy concerning pre-judgment interest, even though it might constitutionally assert such an interest.⁹⁰ This may not seem entirely consistent with New York's policy of requiring full indemnity for the death of its citizens, since by New York standards interest from the date of death is requisite to full indemnity; but the decision in no way impairs the validity of the holding in *Kilberg* that New York has an interest in preventing the obstruction of that policy by the application of arbitrary limitations on the amount recoverable. The New York policy so far as limitations are concerned was long-established and fundamental; the New York court regarded the policy concerning pre-judgment interest as less urgent, for reasons satisfactory to itself—including what the court conceived to be practical reasons affecting the interests of New York litigants caught in the coils of the conflicts system.⁹¹

⁹⁰ "Whether we now refuse to apply our prejudgment interest statute because, as we said in the *Murmann* case, 'The Legislature had no intention to make it reach so far' ... or whether we refuse to do so because our statutory provision authorizing the addition of such interest ... 'constitute[s] a part of the substantive law of the state' ... the meaning and effect are the same." 11 N.Y.2d at 394, 183 N.E.2d at 904, 230 N.Y.S.2d at 19.

⁹¹ *Id.* at 9, 183 N.E.2d at 904, 230 N.Y.S. at 20.

Perhaps what troubles the critics is fear that the forum, by adhering to the law of the place of the wrong while reserving the right to reject distasteful provisions of that law, might pick and choose in such a way as to secure for the local plaintiff the benefit of provisions of the foreign law more favorable than the domestic law, while rejecting the less favorable. Suppose, for example, that the laws of New York and Massachusetts were the reverse of what they are on the question of pre-judgment interest: i.e., that Massachusetts provides for such interest while New York does not. Might not New

The court was simply acting with restraint in defining domestic interests, insisting on the application of New York law only where the adverse effect of foreign law on New York's affairs is very severe, and asserting no interest in opposition to that of other interested states in matters of lesser import.

An excellent illustration of this kind of analysis is *Bernkrant v. Fowler*,⁹² where Mr. Justice Traynor declared:

We have no doubt that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to justify the Legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates.⁹³

But, having said this, Mr. Justice Traynor proceeded to define California's interest with moderation and restraint, and with due regard to the interest of the sister state of Arizona in the enforcement of the contract, reaching the result that in the circumstances California policy did not require application of the California statute; there was no conflict. That is the result in *Pearson* so far as pre-judgment interest is concerned; but when it comes to the question of full indemnity versus the arbitrary limitation of liability, New York has legitimately asserted an interest in conflict with that of Massachusetts, and nothing in the Constitution requires that New York's interest be subordinated.

Some commentators on the *Kilberg* decision have expressed concern over the fact that, if New York's interest is based upon its concern for New York people, as indeed it is, the victims of a single accident will be treated differently according to the laws of their home states. Let us confront this problem squarely, even dramatize it. In its early stages, the *Pearson* case was consolidated for trial with another wrongful death action arising out of the same accident:

York, on the basis of the place-of-wrong rule, allow pre-judgment interest while rejecting the \$15,000 limitation? To do so would be indefensible from the standpoint of governmental-interest analysis. In order to have an interest a state must first have a policy, and New York (on our assumption here) has no policy of awarding pre-judgment interest to its injured citizens. In the actual case there was no question of giving the plaintiff any benefit not provided by New York law. Horrible hypotheticals such as the one suggested above are simply the product of the New York court's transitional compromise, paying lip-service to the traditional rule while moving in the direction of governmental-interest analysis.

⁹² 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).

⁹³ *Id.* at 594, 12 Cal. Rptr. at 269, 360 P.2d at 909.

Trauth v. Northeast Airlines.⁹⁴ The deceased and his surviving dependents were residents of New Jersey. A single judge—Judge McGohey—had the responsibility of deciding both cases. As we know, he held that in *Pearson* he was required to follow *Kilberg* and disregard the Massachusetts limitation. But when the plaintiff in *Trauth* moved for leave to amend her complaint to allege damages in excess of \$15,000, he ruled that the motion must be denied, because he found no indication that New Jersey would do otherwise than apply the law of the state of injury. This ruling, contended counsel for Mrs. Trauth, was a denial of the equal protection of the laws.⁹⁵

Rather clearly, it was nothing of the sort. Of course, if New York were to reserve the benefit of its unlimited recovery exclusively for New York citizens, or domiciliaries, or residents, even when the defendant is a New York citizen and the injury and death occur in New York, that would be a denial of equal protection.⁹⁶ But where New York has no interest in applying its protective policy because the deceased and his dependents are nonresidents, except perhaps an altruistic interest in treating all persons alike, and where the state of domicile of the deceased and his dependents has not asserted an interest in their protection,⁹⁷ the application of New York law would probably be a denial of full faith and credit to the law of the only state having an interest in the matter: Massachusetts.⁹⁸

It is a natural reaction to flinch when two parties, apparently so similarly situated, are differently treated; and the reaction is heightened by the juxtaposition of the two cases in the same court at the

⁹⁴ Civil No. 149-256, S.D.N.Y. The author is indebted to Frank G. Sterritte, Esquire, counsel for the plaintiff in *Pearson*, for information concerning the *Trauth* case, including a portion of the transcript and a copy of the brief filed by Speiser, Quinn & O'Brien, attorneys for Mrs. Trauth.

⁹⁵ Matters did not reach the stage where it would have been necessary to instruct a single jury to observe the Massachusetts limitation in *Trauth* but not in *Pearson*. Court and counsel were agreed that the ruling would necessitate a severance; in the end the trial of both cases in the same court was avoided by a settlement of the *Trauth* case.

⁹⁶ Even in such a case, New York might reasonably classify nonresidents according to the laws of their home states. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 29-42 (1960).

⁹⁷ While the New Jersey wrongful death statute, like New York's, provides without limitation for damages that are fair and just with reference to the pecuniary injuries resulting from death, N.J. STATS. ANN. §2A:31-5 (1952), Judge McGohey found that New Jersey would apply the Massachusetts statute.

⁹⁸ See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1366, 1368 (1960).

same time. But on closer examination it is clear that there is a significant difference between the situations of these parties: Mr. Trauth was a citizen of a state less solicitous for the welfare of its citizens than New York was for the welfare of Mr. Pearson and its other citizens. If Mrs. Trauth had sued in her home state of New Jersey, the disparity of treatment would perhaps pass unnoticed. Why should New York attempt to give Mr. Trauth's dependents what New Jersey withholds from them? It can hardly come as a surprise to students of the conflict of laws that differences of domicile sometimes lead to differential treatment of parties. It could easily happen that a single New York court, having before it substantially identical wills, might hold one valid because the testator was domiciled in New York, and the other invalid because the testator was domiciled in Massachusetts,⁹⁹ the two states having different laws.¹⁰⁰ The *Trauth* case is one in which classification according to domicile is not only permissible but mandatory if New York is to avoid unjustified encroachment on Massachusetts' interest.¹⁰¹

The really difficult case would have been presented if Judge McGohey had found that New Jersey, like New York, had asserted an interest in securing full indemnity for its citizens injured outside the state. There would then be a direct conflict between the interests of New Jersey and Massachusetts; but New York would still have no interest in the matter—except, again, its altruistic interest

⁹⁹ "The validity and effect of a will of movables is determined by the law of the state in which the deceased died domiciled." RESTATEMENT, CONFLICT OF LAWS § 306 (1934).

¹⁰⁰ "But the [Privileges and Immunities] clause has nothing to do with the distinctions founded on domicile." *Lemmon v. People*, 20 N.Y. 562, 608 (1860).

¹⁰¹ This is not to say, of course, that a choice-of-law rule referring to domicile should be substituted for the one referring to the place of wrong. What is defended in the text is not a choice-of-law rule at all, in the sense that all states are expected to follow it. The suggestion is that each state is free, and well-advised, to apply its own law for the effectuation of its own policy when it has a legitimate interest in so doing. Massachusetts, for example, would be expected to apply its own law in these cases for the protection of the Massachusetts enterprise; and counsel for the airline would no doubt argue for that result had the plane crashed in New York and the action been filed in Massachusetts. This is what New York did in the days when it limited liability for wrongful death. In *Wooden v. Western N.Y. & Pa. R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891), a case heavily relied on in *Kilberg*, the injury occurred in Pennsylvania, whose statute contained no limitation; the New York statute at the time did contain a limitation; the New York court applied his own statute on the ground that it pertained "to the remedy, rather than the right," but made it reasonably clear that it was applying New York policy for the benefit of the New York enterprises for which it was designed—the defendant being a New York corporation.

in treating all persons alike. Possibly that interest would be sufficient to justify application of New York law, though it would seem clearly insufficient if it were in conflict with the interest of Massachusetts alone. Aside from that possibility, the situation presents once again the intractable problem of the disinterested third state. Concerning that problem I have in the past made some rather facetious remarks.¹⁰² To a degree the jesting has been in earnest; yet I appreciate the fact that in some areas of the law, at least, where the disinterested forum has no alternative but to adjudicate the case, there are better solutions than for the court simply to apply the law of the forum by default, and that these solutions can be defended on some rational basis even though the disinterested forum is hardly in position to make a deliberate choice between the competing governmental interests of the other states involved. Indeed, I am inclined to believe that it was in this kind of case, where the forum had no interest in the matter but had to decide the case somehow, that rules for choice of law originated, and that it was only at some late stage of their development that the conceptual justifications for them burst the bounds of the problem and began to subvert the interests of the forum state itself. But this is a matter for future consideration. So far as our hypothetical variant of the *Trauth* case is concerned, although it is possible that a better solution could be found in some rather arbitrary choice-of-law rule, I repeat, notwithstanding criticism that I greatly respect,¹⁰³ that New York's application of its own law would not be unconstitutional, simply because no one can show that the presumptively applicable law of the forum should be displaced by any *particular* foreign law. If, instead, New York elects to choose between the competing foreign laws, any rule it adopts for that purpose should be judged by its pragmatic values alone; "the Constitution and the first principles of legal thinking"¹⁰⁴ have nothing to do with it.

¹⁰² See Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 279 (1961).

¹⁰³ See Schreter, "Quasi-Community Property" in the Conflict of Laws, 50 CALIF. L. REV. 206, 233 n.172 (1962); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 863 (1961); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 478 (1960).

¹⁰⁴ Cf. *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922) (per Holmes, J.).
[Editor's Note: For the most recent development in the *Pearson* case, see Epilogue, p. 53 *infra*.]

III

GUEST STATUTES—BABCOCK

If New York is solicitous for the welfare of its citizens killed in aircraft accidents outside the state, it is singularly callous concerning the welfare of its citizens injured outside the state while guests in motor vehicles. In *Babcock v. Jackson*¹⁰⁵ the plaintiff and the defendant,¹⁰⁶ both residents of Rochester, New York, set out from Rochester on a trip that took them into the Canadian province of Ontario, the plaintiff being a guest in the defendant's automobile. In Ontario the car went out of control and collided with a stone wall, seriously injuring the plaintiff. When she sued in New York the defendant pleaded the Ontario guest statute, a Draconian provision without parallel in any of the United States:

Notwithstanding the provisions of Section 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of, any person being carried in, or upon, or entering or getting into, or alighting from such motor vehicle.¹⁰⁷

Special Term granted a motion to dismiss the action. The Appellate Division affirmed without opinion. Only a fervent dissent by Mr. Justice Halpern prevented this remarkable decision from passing into oblivion.

Mr. Justice Halpern provided at least five distinct bases on which a different result might be rested:

1. The precedent of *Kilberg*, with its emphasis on the strong policy of New York and that state's interest in applying its compensatory policy for the protection of its own injured residents. "The New York Legislature has repeatedly refused to enact a statute denying or limiting the right of a guest to recover from his host. . . ."¹⁰⁸

2. The "center of gravity" theory, or the concept that the applicable law is that of the state having "the most significant contacts" with the case. This theory, applied to a contract case by the

¹⁰⁵ 230 N.Y.S.2d 114 (App. Div. 1962).

¹⁰⁶ The action was brought against the executor of the deceased driver, but for convenience the opinion of Mr. Justice Halpern refers to the defendant's testator as the defendant, and that practice will be followed here.

¹⁰⁷ 230 N.Y.S.2d at 115-16.

¹⁰⁸ 230 N.Y.S.2d at 117.

New York Court of Appeals in *Auten v. Auten*,¹⁰⁹ was capable of being extended to tort cases.¹¹⁰

3. Characterization of the problem as one of contract, or of the relationship of host and guest, thus permitting application of New York law on the authority of *Dyke v. Erie Ry.*¹¹¹

4. A choice-of-law rule on the English model, whereby the foreign tort is actionable if actionable by the law of the forum and not justifiable by the law of the place of the wrong. The negligence of the defendant was a punishable offense by the law of Ontario. By resort to the English rule, Ontario's sister province of Quebec had avoided application of the Ontario guest statute when one of its residents was injured by another in Ontario.¹¹²

5. The doctrine of renvoi: i.e., that the rule that the law of the place of injury governs is a reference to the whole law of that state, including its choice-of-law rules. Investigation might reveal that Ontario itself would not apply its statute to an accident involving only nonresidents.

These various approaches, I feel obliged to note, vary a great deal in their soundness.¹¹³ Whatever merit the renvoi approach may have in some circumstances, its application here would give the result into the keeping of the Ontario courts, where it distinctly does not belong. Had the case been decided on this ground, the result would have been in doubt until such time as the trial court, on remand, had inquired into the Ontario choice-of-law rule. Even then, the result of the inquiry might be inconclusive. Worst of all, the result might have been a finding that Ontario would apply its statute notwithstanding. New York's interest being clear, to let the result depend on Ontario's views on the conflict of laws would be sheer abdication.

The English rule, while yielding an acceptable result in the case before the court, is not a sharp tool for treating tort problems

¹⁰⁹ 308 N.Y. 155, 124 N.E.2d 99 (1954).

¹¹⁰ However, Judge Fuld, author of the opinion in *Auten*, felt foreclosed by precedent from applying this test in *Kilberg*. See note 8 *supra*.

¹¹¹ 45 N.Y. 113 (1871). Since *Babcock* was not an action for wrongful death, the obstacle to this characterization encountered in *Kilberg* was not present.

¹¹² *McLean v. Pettigrew*, [1945] 2 D.L.R. 65, cited in 230 N.Y.S.2d at 122.

¹¹³ I do so in no spirit of criticism of Mr. Justice Halpern; he was fighting with all available weapons to avoid an irrational and unjust result, and had to contend with a court of appeals that is by no means clear as to its methods and objectives in the field of conflict of laws.

generally in the conflict of laws. Ingenious characterization merely suppresses the real reasons for the decision. With the "center of gravity" theory we shall have to deal in Part IV; to avoid repetition, let us observe here only that there is no assurance that a court, starting from a territorialist bias and placing a premium on uniformity, might not assess the "territorial contacts" and the "domiciliary contacts" and conclude that Ontario has the most significant "contacts" with the case.¹¹⁴

It is Mr. Justice Halpern's analysis of governmental interests that gives conviction to his dissenting opinion. New York's policy of requiring the tortfeasor to compensate the guest is clear; its interest in applying that law for the benefit of the injured New York resident is equally clear. On the other hand, Ontario has no interest at all in the application of its guest statute. Again we must beware of overgeneralized statements concerning the interest of the state of injury. That state normally has an interest in the application of certain of its policies: e.g., its policy of deterring hazardous conduct, or of protecting local medical creditors. But we are here concerned with a specific policy, expressed in the guest statute, that has nothing to do with promoting safety nor with securing reimbursement to local Samaritans. The guest statute expresses a policy for the protection of defendants. The defendant here, however, is not a citizen or resident of Ontario; he is a citizen of a state that holds him accountable for injuries to his guests.

It is probably more accurate to label the Ontario policy one for the protection of automobile liability insurers. "[Guest statutes] have been the result of persistent lobbying on the part of liability insurance companies."¹¹⁵ This was recognized by Mr. Justice Halpern:

The primary purpose of the Ontario statute was stated by an academic commentator, shortly after its enactment, as follows: "Undoubtedly, the object of the provision is to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies."¹¹⁶

But this restatement of the policy does not affect the conclusion that Ontario has no interest in its application in the *Babcock* situation.

¹¹⁴ Cf. text at note 50 *supra*.

¹¹⁵ PROSSER & SMITH, CASES ON TORTS 215 (3d ed. 1962).

¹¹⁶ 230 N.Y.S.2d at 117.

Mr. Justice Halpern correctly stated that "In the light of this purpose, it is apparent that the interest of Ontario in the enforcement of its legislative policy is limited to accidents involving Ontario residents [as defendants]."¹¹⁷ Automobile liability insurance rates are based upon loss experience in artificially defined territories.

It is important to keep in mind that these territories are aggregates of assureds, not aggregates of claimants or accidents. Thus, a claim against an entrepreneur is allocated to his territory even if the accident giving rise to the claim was outside the territory, the claimant resided outside the territory, or suit was brought in a remote jurisdiction.¹¹⁸

A judgment against Jackson for the injuries suffered by his guest in Ontario would not affect insurance rates in Ontario. If this were not so, we should have to concede Ontario an interest in the application of its law, and it could be said of the *Babcock* decision that, though it subverts the interest of New York, it furthers the interest of the foreign state. As matters stand, however, it can only be said that the decision subverts the interest of New York without advancing the interest of any state.¹¹⁹

¹¹⁷ *Ibid.*

¹¹⁸ Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 565 (1961). Normally the assured's territory is that in which he resides. If in certain special cases it is instead the territory in which the automobile is habitually garaged, that fact can give no comfort to proponents of the strange concept that the applicable law (as to liability to guests) should be that of the place where the automobile is garaged. See EHRENZWEIG, *CONFLICT OF LAWS* 518 (1962). Actuarially that proposal is demolished by Morris, *supra*, at 574-576. That it would poorly effectuate the interests of the affected states is obvious.

¹¹⁹ In an effort to distinguish the troublesome case of *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962) (holding that the law of the state of injury governs as to the allowability of prejudgment interest), Mr. Justice Halpern took what I regard as a too restricted view of New York's interests. In *Davenport* New York residents were killed in Maryland in a collision between the car in which they were traveling and a truck owned and operated by Virginians. "The only connection of New York State with the case was that the decedents were residents of the state. In that situation, there was no basis for a claim that New York State had a dominant interest in the case. The Maryland law would therefore have been applicable even under the 'proper law of the tort' approach." 230 N.Y.S.2d at 121. This illustrates well the weakness of all such approaches, including the "center of gravity" and the "grouping of contacts." New York's concern for the welfare of its own citizens is not diminished when they are injured by nonresidents rather than by fellow New Yorkers. The significance of the fact that the defendant is a nonresident is simply that because of that fact another state may have an interest in the application of its law. (We cannot digress here to consider the bearing of the fact that in *Davenport v. Webb* the defendants were Virginians rather than residents of Maryland, the forum state.) New York may choose to defer to that interest by not asserting a conflicting one, as it did in *Davenport*, but New York cannot wisely decide that it will routinely defer to the interests of the defendant's state. Thus if the defendant in *Babcock* had been a resident of Ontario, it would not automatically follow that Ontario law should be

This being so, it is difficult to understand how the four other Appellate Division justices turned a deaf ear to Mr. Justice Halpern's argument. Territorialist dogma can have a hypnotic effect, but it is difficult to believe that in this sophisticated age that effect alone can account for such a phenomenon. Presumably these justices, like the law-review commentators on *Kilberg*, have committed themselves to the ideals of simplicity and uniformity as near absolutes, to be secured at almost any cost. It is difficult to reason against such convictions. It apparently does little good to point out that simplicity and uniformity come too high when the effect on state policies and interests is totally disregarded. Possibly it may help a little to repeat that a case such as *Babcock* does not really raise a problem in the conflict of laws at all. A conflicts problem does not arise merely because a statement of the facts of the case requires mention of two states. A true problem arises only when the laws of two or more states are in conflict, in the sense that each state has an interest in the application of its distinctive legal policy. It was presumably for such cases that choice-of-law rules were devised. Such rules do not serve well in the solution of true problems; they are utterly indefensible when, in application to false problems, they simply subvert the interest of the only interested state. If it is uniformity we want, let it be achieved in cases of the *Babcock* type by appealing to all states to apply the law of the only interested state: New York.

At some time in the future it may come to be recognized that in this decision New York has denied to the plaintiff, *Babcock*, the equal protection of its laws. I do not expect a decision to that effect in the near future. So deeply have we been indoctrinated by territorialist notions that a court would have to be not only perceptive but quite bold in order to declare that the occurrence of the injury in Ontario was not a reasonable basis for classification. Similarly, the commitment to uniformity at any price is so general that even I would hesitate to deny a state the right to pursue that goal by any device it may choose. Yet I would not hesitate for long in such a case as this. If Ontario had the slightest interest in the matter, the classification could be justified by deference to that

applied. Ontario would have an interest in the application of its guest statute for the protection of the defendant. But New York's interest in the application of its own law would remain—if New York chose to assert it; and no "proper law" or "center of gravity" theory can demonstrate that New York's interest is inferior.

interest; but when there is no conceivable Ontario interest, and when uniformity could easily be obtained if all states would recognize New York's interest, to deny a New York resident the protection of New York law simply because the accident happened in Ontario is arbitrary and irrational. The United States Supreme Court has already held that a state may not arbitrarily close its courts to its residents injured abroad;¹²⁰ it may some day hold that a state may not arbitrarily deny its residents the benefit of its laws merely because they were injured abroad.¹²¹

IV

CHILD SUPPORT: HAAG

It is painful for me to take issue with anyone who, sharing the widespread disillusionment with the traditional system of conflict of laws, is diligently seeking new methods of analysis. It is especially painful to take issue with those who would abjure the talismanic single "contact" of the traditional rule and inquire into the significance of the various ways in which a state is related to the case, since this is certainly a step in what I conceive to be the right direction. But it is precisely because there is some superficial resemblance between the "grouping of contacts" theory and the method of governmental-interest analysis that I feel called upon to emphasize the differences between the two methods, and to use strong language in pointing out what seem to me the deficiencies of the "grouping of contacts" approach.

Governmental-interest analysis is, of course, concerned with the ways in which the respective states are related to the parties, the events, and the litigation; it is impossible even to define a problem in the conflict of laws without taking account of such relationships. Governmental-interest analysis is also concerned with the significance of those relationships. But here the resemblance ends. The "grouping of contacts" theory provides no standard for determining what "contacts" are significant, nor for appraising the relative significance of the respective groups of "contacts." Governmental-interest analy-

¹²⁰ *Hughes v. Fetter*, 341 U.S. 609 (1951).

¹²¹ Similarly, the decision may be regarded as a denial of due process by analogy to *Homes Ins. Co. v. Dick*, 281 U.S. 397 (1930). If a state denies due process by applying its own law when it has no interest in doing so, it does so equally when it applies the law of a foreign state having no interest in the application of its law.

sis determines the relevance of the relationship by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law. Its methodology—while no one would claim for it ease of application, or complete objectivity, or more precision than we ordinarily find in legal reasoning—is at least the familiar one of construction and interpretation. That methodology permits, and requires, a statement of the reasons why a state's relationship to the case is thought to be significant. The statement is sufficiently objective to be susceptible of objective criticism. It is explicitly an attempt to determine legislative purpose, and if that purpose is misinterpreted, legislative correction is invited. The process of “grouping contacts” has none of these features. It deals in broad generalities about the “interest” of a state in applying its law without inquiry into how the “contacts” in question relate to the policies expressed in specific laws. One “contact” seems to be about as good as another for almost any purpose. The “contacts” are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is the more significant. The reasons for the conclusion are too elusive for objective evaluation. State interests are quite likely to be thwarted in the confusion. The pronouncement that the “contacts” with State X are the more significant has a mystical sound, as if the supreme authority had pronounced the true Nature of Things. Like the older pronouncement that the law of the place of injury, or of contracting, must govern, this must have a tendency to inhibit legislative intervention. As of old, the impression given is that it is the business of legislatures to make laws for domestic consumption; it is the task of the courts to determine how those laws operate in cases involving other states. How can the legislature change the “center of gravity”? Can it change the value of π ?

We have already seen, in the law-review criticisms of *Kilberg*, how poorly governmental interests can fare in the calculus of “contacts.” *Haag v. Barnes*¹²² is another case in point. It provides an excellent specimen for laboratory analysis of the “grouping of contacts” theory in comparison with the analysis of governmental

¹²² 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961). See Ehrenzweig, *The “Bastard” in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498 (1962).

interests, for here we see the former method applied by the hands of its prime judicial advocate.

Norman Barnes was a resident of Illinois who on occasion traveled to New York on business. On such an occasion in 1954, having need of secretarial services, he employed Dorothy Haag, a resident of New York, through a local agency. The employment relationship evolved into one of friendship and then of intimacy, with the alleged result that Dorothy became pregnant. After an interval during which she visited her sister in California, she went to Chicago to see Barnes and succeeded only in seeing his attorney, who advised her to go to a Chicago hospital, where the child was born. Apparently she then returned to New York, where she was still unable to see Barnes. At the request of his attorney she went again to Chicago, employed an attorney there, and there signed an agreement for the child's support. The agreement recited payments already made; Barnes promised to pay \$275 a month until the child should attain the age of sixteen; Barnes was released from all further obligation; and the parties agreed that their contract should "in all respects be interpreted, construed and governed by the laws of the State of Illinois."¹²³

Dorothy agreed to remain with the child in Illinois for two years, but apparently this was not done; in accordance with a provision of the contract, she secured Barnes's consent to go to California instead. After two years, she returned to New York with the child. About a year later she instituted a support proceeding against Barnes, in which he pleaded the Illinois agreement as a complete defense. Under the law of Illinois "such father may compromise all his legal liability on account of such bastard child, with the mother thereof, without the written consent of such judge, by paying to her any sum not less than eight hundred dollars."¹²⁴ Under New York law, "An agreement or compromise made by the mother . . . shall be binding only when the court shall have determined that adequate provision has been made."¹²⁵ The court of special sessions dismissed the complaint; the appellate division¹²⁶ and the court of appeals affirmed.¹²⁷

¹²³ 9 N.Y.2d at 558, 175 N.E.2d at 443, 216 N.Y.S.2d at 67.

¹²⁴ See 11 App. Div. 2d at 433, 207 N.Y.S.2d at 628.

¹²⁵ See 9 N.Y.2d at 58-59, 175 N.E.2d to 443, 216 N.Y.S.2d at 68.

¹²⁶ 11 App. Div. 2d 430, 207 N.Y.2d 624 (1960).

¹²⁷ 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

There was reason enough for this judicial unanimity. The settlement appeared to be a generous one. The New York courts obviously thought that it made more than "adequate provision" for the child's support. In these circumstances the requirement of judicial approval at the time the contract was made may well have seemed "a mere formality,"¹²⁸ and the absence of such approval a technical defect curable *nunc pro tunc* by a finding of adequacy in the pending proceeding. If the court had said this and nothing more, the case would have been noncontroversially disposed of; in this light, there was simply no conflict between Illinois and New York. In the end the court of appeals said substantially as much ("[W]e must conclude that the 'welfare of the child' is full protected").¹²⁹ Before saying this, however, the court of appeals spread upon the pages of the New York Reports, from which it can never be eradicated, a disquisition on the conflict of laws that presumably is to control the decision of other cases in the future—some of them, perhaps, cases in which the provision made by the father is less generous.

Putting aside the "traditional view" that the law governing a contract is to be determined by the intention of the parties, Judge Fuld said:

The more modern view is that "the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'" . . . Whichever of these views one applies in this case, however, the answer is the same, namely, that Illinois law applies.

....
The agreement, in so many words, recites that it "shall in all respects be interpreted, construed and governed by the laws of the State of Illinois" and, since it was also drawn and signed by the complainant in Illinois, the traditional conflicts rule would, without doubt, treat these factors as conclusive and result in applying Illinois law. But, even if the parties' intention and the place of making of the contract are not given decisive effect, they are nevertheless to be given heavy weight in determining which jurisdiction "has the most significant contacts with the matter in dispute." . . . And, when these important factors are taken together, with other of the "significant contacts" in the case, they likewise point to Illinois law. Among these other Illinois contacts are the following: (1) both parties are designated in the agreement as being "of Chicago, Illinois," and the defendant's place of business is and always

¹²⁸ 11 App. Div. 2d at 434, 207 N.Y.S.2d at 628.

¹²⁹ 9 N.Y.2d at 561, 175 N.E.2d at 444, 216 N.Y.S.2d at 70.

has been in Illinois; (2) the child was born in Illinois; (3) the persons designated to act as agents for the principals (except for a third alternate) are Illinois residents, as are the attorneys for both parties who drew the agreement; and (4) all contributions for support always have been, and still are being, made from Chicago.

....

Contrasted with these Illinois contacts, the New York contacts are of far less weight and significance. Chief among these is the fact that child and mother presently live in New York and that part of the "liaison" took place in New York. When these contacts are measured against the parties' clearly expressed intention to have their agreement governed by Illinois law and the more numerous and more substantial Illinois contacts, it may not be gainsaid that the "center of gravity" of this agreement is Illinois and that, absent compelling public policy to the contrary... Illinois law should apply.¹³⁰

I find disturbing this indiscriminate accumulation of "contacts" without reference to any standard. I also find disturbing the conclusion that "it may not be gainsaid" that the "center of gravity" is Illinois, with its implication that not even the legislature can change the result. This is not the way of governmental-interest analysis. That method inquires first of all into the policies expressed in the respective laws. The court of appeals did inquire into the purpose of the New York statute, though at the end rather than at the beginning of its opinion. As a result we know that the policy of that statute is primarily to secure the welfare of the child, and ultimately to protect the community against the contingency of the child's becoming a public charge. The policy of Illinois was apparently to prefer freedom of contract over restrictions designed to safeguard the child and the community, to encourage out-of-court settlement of support claims, and to enable the unfortunate father to escape a continuing burden of support by the payment of a modest price, if his bargaining power should be sufficient. This is not a particularly humane or prudent policy, and it has since been abandoned by Illinois; but neither of those matters is our concern here.¹³¹

The next step is to determine the circumstances in which the respective statutes must be applied in order to effectuate the policies

¹³⁰ *Id.* at 559-60, 175 N.E.2d at 441, 216 N.Y.S.2d at 68-69.

¹³¹ *Cf. Milliken v. Pratt*, 125 Mass. 374 (1878), in which the court questionably allowed a change of law subsequent to the transaction to affect its decision as to the "policy" of the forum state.

declared in the statutes. For the New York court the problem concerns primarily the New York statute; but let us dispose first, and somewhat summarily, of the problem from the standpoint of the Illinois courts. Conceivably they might give a restrained and moderate interpretation to the Illinois statute, finding that it was not intended to apply where the mother is a resident of another state. Let us assume, however, that they will give it a fairly broad, though still reasonable, interpretation, holding it applicable whenever the father is a citizen or resident of Illinois.

Turning to the New York statute, we find the problem complicated by a degree of uncertainty as to an important fact. In general the case is treated by the courts on the basis that Dorothy was at all relevant times a resident of New York. As the dissenting justices in the appellate division noted, however, the record was unsatisfactory as to her sojourns in California before and after the birth of the child.¹³² Instead of affirming a summary dismissal, they would have remanded the case for a hearing and finding on Dorothy's residence at the time of the making of the contract. The fact that this course was not followed suggests that the majority of the appellate division, and the court of appeals, felt that the result would not be changed even though all doubt that she was a resident of New York at that time were dispelled. The complaint alleged that she had been a resident of New York since 1947. A fair inference would seem to be that while in California she was temporarily visiting her sister, and did not give up her New York domicile. We need not, however, attempt to fill gaps in the record by speculation. We may discuss the case first on the assumption that Dorothy was at all relevant times a resident of New York, and then consider the interesting problem that is presented by the possibility that she was a resident of another state at the time the contract was made.

On the assumption first stated, surely New York might reasonably assert an interest in the application of its policy. It is New York that is concerned with the welfare of the child; New York is the community that would be affected should the child become a public charge. This is not to say that New York must, or necessarily would, construe its statute (or define its interest) thus broadly. It might reasonably take into account the interest of Illinois in

¹³² 11 App. Div. 2d at 435-36, 207 N.Y.S.2d at 629-31.

protecting the father, and perhaps some of the other circumstances of the case, and conclude that it should not create a conflict by asserting a conflicting interest.¹³³ Perhaps the *Haag* case can be interpreted as just this sort of determination, though I cannot easily accept that view when the discussion does not relate at all to the scope of New York's legitimate interest in applying the policy of its law, nor to the proper construction of the statute. I am inclined to suspect that, in a matter of such clear concern to New York, if the discussion had been explicitly in terms of whether New York should assert an interest in the application of its law for the protection of New York residents, no such extremely deferential result would have been likely.

It will be noted that in this analysis we have mentioned only those relationships between the parties, the transaction, and the litigation that appear to be relevant to the policies of the respective statutes. Possibly some that are relevant have been omitted; let us review Judge Fuld's enumeration:

(1) The intention of the parties, including the specific agreement that the contract should be governed by Illinois law, should be quite irrelevant. Presumably in a domestic case a mother would not be allowed to sell her child's statutory birthright by agreeing to be bound by the law of Illinois. No more should she be allowed to do so in a mixed case. New York's concern for the welfare of the child and the community cannot intelligently be committed to the discretion and bargaining power of the mother.

(2) The place where the contract was "drawn and signed by the complainant" should also be irrelevant. (I do not mean to make an issue of the fact that Dorothy swore, and the defendant did not deny, that *he* executed the contract in New York.)¹³⁴ Because such arbitrary circumstances are familiar as critical "contacts" in choice-of-law rules, there may seem to be, superficially, some relevance. But can anyone imagine that a New York court, setting out to construe the New York Domestic Relations Law, rather than to determine "what law governs," would hold that the statute was intended to apply only to contracts made in New York, and that the legislative purpose could be effectuated by such a construction?

(3) The fact that the defendant was a resident of Illinois is

¹³³ Cf. *Bernkrant v. Fowler*, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).

¹³⁴ 207 N.Y.S.2d at 630 (dissenting opinion).

relevant as establishing an interest on the part of Illinois in the application of its father-protective policy.¹³⁵ The fact that his place of business was in Illinois seems irrelevant. A statute relating to some subject other than paternity might conceivably be held to be for the benefit and protection of local businessmen, regardless of their residence; it is even remotely conceivable that this very statute could be so construed, though that seems beyond the pale of the practical. It is easier to conceive of a holding that the statute is for the benefit of all businessmen, wherever they live or ply their trades, who become involved in Illinois; that would at least make sense in terms of Chicago's status as a convention city.

(4) The fact that the child was born in Illinois is fortuitous and obviously irrelevant to either of the policies involved, the mother and custodian being a resident of New York.¹³⁶

(5) The fact that the persons named in the contract to act as agents for the parties were residents of Illinois seems irrelevant, though this can hardly be declared with confidence since we are not told what functions these agents were to perform. Without burdening this discussion with speculation on the point, I must say simply that I cannot imagine any function to be performed by agents, or arbiters, under such a contract that would bear significantly on the effectuation of the respective governmental policies. The fact that the lawyers who drew the contract were residents of Illinois is irrelevant unless we can conceive that a New York court would hold that the statute applies only to contracts drawn by New York lawyers, because only New York lawyers can be supposed to know New York law. I do not believe that Judge Fuld would so hold if he were *construing* the statute; I believe he considered the fact relevant only because he was engaged in the mystical process of determining "what law governs."

(6) The fact that all contributions for support were made from Chicago is utterly irrelevant, and no one who has not been corrupted by the traditional system's preoccupation with "place of perform-

¹³⁵ I leave out of account Judge Fuld's reference to the recital in the contract that both parties were "of Illinois" (quotation *supra* note 130) since it conflicts with the assumption that Dorothy was at all relevant times a resident of New York. Moreover, the doubts expressed about her residence were based on the possibility that she was then a resident of California; there is no serious suggestion that she was ever a resident of Illinois.

¹³⁶ Cf. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

ance" would consider for a moment that anything should turn on whether Mr. Barnes mailed his weekly and monthly checks from Chicago or had his attorney deliver cash in person in New York.

As for New York, it is relevant, as Judge Fuld notes, that Dorothy was a resident; but the fact that "part of the 'liaison' took place there" is relevant only if we assume a rather unlikely construction of the New York statute.

One is tempted to go farther, and point out that some of the "contacts" mentioned in the opinion are not taken into account in the calculus (such as the fact that the contract of employment was made in New York, through a New York employment agency), and even to speculate on the weight to be given "contacts" not mentioned in the opinion. But it is not necessary to be facetious in order to emphasize that significance has been attributed to circumstances irrelevant to the definition of New York's interest in applying its policy. In fairness to Judge Fuld, it must be said that he did not claim that these circumstances were relevant in construing the New York statute, but only in the process of determining "what law governs." But the gist of my criticism is that he should have been concerned with construing the New York statute instead.

We have established, I think, that only two relationships between the respective states and the parties, the events, and the litigation need be taken into account in order to formulate a definition of governmental interests that each state *might reasonably* make. It does not follow, of course, that no other facts or relationships can be relevant in the court's actual definition of those interests. A court inclined to define local interests with moderation and restraint might with justification take other circumstances into account. For example, it would not be unreasonable to distinguish between the *Haag* case and one in which the New York mother-to-be travels to Illinois and there seduces the man. Possibilities need not be multiplied. The point is that in defining the scope of New York's interest in the parties and the events the circumstances given weight must derive their significance from limitations that can reasonably be placed on the reach of New York's policy.

It is evident that when the irrelevant contacts are brushed aside there remains no scope for weighing, measuring, counting, and otherwise determining the "center of gravity." It is no longer reasonable, if it ever was, to say that "the New York contacts are of far less

weight and significance." The father is a resident of Illinois, and Illinois has an interest in applying its policy for his protection. The mother is a resident of New York, and is custodian of the child, and New York has an interest in applying its law for the welfare of the child and the community. These interests can be weighed in the scales of individual opinion, or congressional opinion, but not in any scales furnished to judges by the science of conflict of laws. I do not presume to say that the court should have asserted for New York an interest in the application of its law in the *Haag* case. I say only that it should have addressed itself to the question whether in the circumstances the New York statute should have been construed to be applicable for the necessary effectuation of New York policy, and that, if it had reached an affirmative answer to this question, it should have applied New York law.

Given the fact that the settlement agreement was adequate by New York standards, all this may seem beside the point; but this is a dangerous refuge. The opinion spells out a method of solving not only future problems of child support but problems of contract generally in the conflict of laws and, not improbably, noncontract problems as well. I am not at all sure that the refuge of "local public policy," reserved by the court in concluding its opinion, is an adequate device for dealing with future cases in which the Illinois father provides not \$275 a month but a lump-sum settlement of, say, \$900, or \$1,000, or \$3,000. Even as one is reassured by Judge Fuld's indication that New York policy will come into play whenever the provision for the child is inadequate by New York standards, one recalls with apprehension the condemnation that has been heaped upon courts for thus avoiding the "applicable" law. In addition, there is special ground for concern: so long as New York persists in designating the law of a sister state such as Illinois as the applicable law, and relying on a second-line defense of "local public policy" to protect its interests, it runs grave risk that its decision will be held unconstitutional, as in *Pearson*. In a case parallel to *Haag* except that the provision for the child is grossly inadequate, New York could protect its interests only by striking down a defense under the "applicable" law. The logic of the Brandeis position cannot be avoided so long as it is conceded that the foreign law is exclusively applicable, on whatever theory; the fallacy of the position is exposed only by recognition that the foreign law is not exclusively

applicable in the first place, but that New York law is applicable because of New York's interest in the effectuation of its policy.

We have now to consider briefly the problem presented on the assumption that at the time of the settlement agreement Dorothy was not a resident of New York, but returned to New York before bringing the support proceeding. For simplicity, and to state the strongest case for the application of Illinois law, let us assume that at the time of contracting she was a resident of Illinois. On this assumption, at the time of contracting Illinois was the only state having any interest in the matter; the contract would be a valid release by the law of the only interested state. At first sight, therefore, it would appear anomalous to suggest that by moving to New York Dorothy could acquire for the child greater support rights. Yet New York's concern for the welfare of the child, and for the community, is no less than it was on the assumption that Dorothy was a New Yorker at the time of contracting. It is by no means unreasonable to suggest that New York has a very real interest in the application of its law in these circumstances, and that the interest of Illinois in immunizing the father from liability for support is not entitled to prevail over the interests of other states that may later become affected. In *Yarborough v. Yarborough*¹³⁷ a Georgia court had purported, in a divorce proceeding, to absolve a father from all further responsibility for the support of a minor child upon his paying the sum of \$1,750 to a trustee for that purpose. Later, residing with her grandparents in South Carolina, the child sought additional support. The Supreme Court held that full faith and credit to the Georgia judgment precluded South Carolina from imposing further duties on the father. Mr. Justice Stone wrote a powerful dissenting opinion, concurred in by Mr. Justice Cardozo. The decision may have been required—I am inclined to think it was—by the act of Congress specifically directing that judgments “shall have the same . . . faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”¹³⁸ No such congressional implementation of the clause applies to the laws of the several states, as distinguished from judgments,

¹³⁷ 290 U.S. 202 (1933).

¹³⁸ 28 U.S.C. § 1742. The quotation is from the 1948 revision, which was of course not in force at the time; but the statute was not materially altered by the revision, despite the insertion of the word “Acts.”

however; and Mr. Justice Stone's dissenting opinion provides ample basis for a firm belief that the Supreme Court would not hold New York precluded by a mere contract made in Illinois from asserting its interest in the case supposed. No quotation brief enough to be appropriate here could do justice to the opinion; it should be read in its entirety by anyone who doubts the constitutionality of such an application of New York law.

The fact remains that one must regard with some concern the phenomenon that the settled rights of the parties, under a contract lawful by reference to the laws of the only state having an interest at the time, can be unsettled by the unilateral act of the one party in moving her residence to another state. In previous discussions of this general problem, I have suggested that, normally, a "governmental interest," as the term is used in conflict-of-laws analysis, must be the product of (1) a governmental policy, and (2) a concurrent relationship with the parties, the events, or the litigation such as to provide a reasonable basis for application of the policy. I have further suggested that a state's application of its policy to a contract in which it had no interest at the time of contracting raises a problem analogous to that of the retroactive application of legislation in a domestic case.¹³⁹ In the version of the *Haag* case under discussion, when the contract was made in 1956, New York had its policy relating to support of illegitimate children but no interest in applying that policy to *Haag* and *Barnes*; when such a statute is retroactively applied to a wholly domestic case, while it may be said loosely that the state at all times had an "interest" in the matter, it had, at the time of contracting, no such policy.

To say that application of New York law in such a situation is comparable to the retroactive application of legislation is not to condemn it. Much retroactive legislation is both desirable and constitutional. The test is essentially one of reasonableness in the light of all the circumstances; the exigency of the public need is to be balanced against the unsettling of private expectations. "[I]n very general terms the two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public in-

¹³⁹ The suggestion is only that there is an *analogy*. It is, of course, true that the New York Domestic Relations Law, enacted in 1925, is not given literally retroactive effect if applied to a contract made in 1956; but if the contract is one made in Illinois in the circumstances under discussion, the effect is much the same.

terest it serves and the unfairness created by its retroactive operation. . . ."¹⁴⁰ The interest of a state in securing adequate support of children within its borders is a vital one; the fathers of such children can complain with little grace that they relied on a state of the law, or on a contract, absolving them of responsibility. There can be little doubt that New York could constitutionally make its Domestic Relations Law of 1925 applicable to domestic settlements concluded prior to its enactment. If so, for similar reasons it may apply that law to a contract made in Illinois at a time when New York had no interest in the matter. "[I]t would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it."¹⁴¹

It happens, however, that New York has not chosen to apply its Domestic Relations Law to supersede support agreements made prior to its passage.¹⁴² Thus New York has not declared that its policy of requiring paternal support for illegitimate children is so exigent as to require the disturbance of rights previously settled by domestic contract. In previous discussions of the general problem, I have taken the position that the absence of such a declaration should be decisive of the question whether the statute should be applied to the out-of-state contract. Under the stimulus of constructive criticism¹⁴³ I have reconsidered this position, and agree that it needs modification. It was based upon the feeling that a state cannot consistently say that no such exigency exists as to require abrogation of pre-existing contracts, and at the same time assert that urgent policy considerations require abrogation of foreign contracts. This was

¹⁴⁰ Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 727 (1960). See also Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960) ("[Q]uestions of retroactive law are essentially questions of substantive due process, and . . . any attempt to treat retroactivity as a special category to which special rules are to be applied is wasted effort." *Id.* at 216); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 621, 852 (1944); Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231 (1927), 6 TEXAS L. REV. 409 (1928).

¹⁴¹ Stone, J., dissenting in *Yarborough v. Yarborough*, 290 U.S. 202, 225 (1933).

Cf. *Ford v. Ford*, 371 U.S. 187 (1962), which, in conjunction with *May v. Anderson*, 345 U.S. 528 (1953), seems to suggest that for purposes of full faith and credit there may be no such thing as a judgment finally determining the custody of a minor child.

¹⁴² *Ippolito v. Terragni*, 140 Misc. 606, 251 N.Y.S. 376 (Sup. Ct. 1931).

¹⁴³ E.g., M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 867-69 (1961).

carrying the analogy too far. There is at least this difference between the prior domestic contract and the out-of-state contract: time will cure the obstacle to state policy presented by the prior domestic contract; it can never cure the obstacle presented by the out-of-state contract. Eventually all pre-1925 contracts exonerating New York fathers will fade out of the picture; but unwed mothers from Illinois or Georgia may continue to move to New York with their offspring until the end of time. New York might reasonably, therefore, determine that, while there is no such urgent necessity as would require supersession of prior domestic contracts, out-of-state contracts must be superseded.¹⁴⁴

I conclude that, even if the mother was a resident of Illinois at the time of the settlement agreement, in a case like *Haag* involving inadequate provision for the child, New York has a legitimate interest in applying its own law to require support by the father—if New York will only assert its interest.

CONCLUSION

Of the four decisions that have been considered here, the most indefensible is *Babcock v. Jackson*, which sacrificed New York's interests on the altar of territorialism without advancing the interest of any state. That was a decision, however, by an intermediate appellate court, and one may hope that it will not have enduring value as a precedent. Since there was no real conflict in *Haag v. Barnes*, no immediate harm was done; but the pattern of reasoning laid down for use in future cases forebodes many a real sacrifice of New York interests to those of a foreign state. This, however, is a matter of local rather than national concern, except as a matter of conflict-of-laws theory; if New York is content to subordinate its interests to the competing interests of another state, the rest of us need not protest too much, so long as our own courts are not tempted to follow the precedent. In *Kilberg* the New York court put aside territorialist dogma and, unimpeded by the confusion of "most sig-

¹⁴⁴ These considerations, of course, have altered my view as to the proper disposition of *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960). See Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 290-94 (1961). *Watson v. Employers Liab. Ins. Corp.*, 348 U.S. 66 (1954), is not decisive of the question, for the legislation there involved was retroactively applied. Cf. *Rossville Comm'l Alchhol Corp. v. Denins Sheen Transfer Co.*, 18 La. App. 725, 138 So. 182 (1931); *Bouis v. Aetna Casualty & Surety Co.*, 91 F. Supp. 954 (W.D. La. 1950).

nificant contacts," justifiably asserted New York's interest in opposition to the conflicting interest of Massachusetts. By far the most important of the cases is *Pearson*, in which this enlightened decision is stigmatized as unconstitutional. As this is written, *Pearson* is under reconsideration by the full bench of the Court of Appeals for the Second Circuit. Perhaps by the time this is published the judgment will have been reversed. It must be reversed, if not by the court of appeals, by the Supreme Court. The tragic alternative is that progress toward a rational method of handling conflict-of-laws problems will be paralyzed when it has hardly begun.

EPILOGUE

The foregoing discussion had just been completed when the Court of Appeals for the Second Circuit announced its decision superseding that of the panel in *Pearson* and affirming the judgment of the district court.¹⁴⁵ By a vote of six to three the court adopted the dissenting opinion written by Judge Kaufman as a member of the panel, and Judge Kaufman amplified the views of the majority on the narrow issue dividing the active members of the court. Judge Friendly wrote a dissenting opinion in which Judges Lumbard and Moore joined.¹⁴⁶

Perhaps the most significant aspect of this highly significant decision is the agreement of all nine of the active judges of the circuit that New York could constitutionally apply its own wrongful death statute in the circumstances. At best Judge Swan's opinion for the panel had been ambiguous on this point; at worst, in Judge Kaufman's terms, it froze "into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time when that jurisprudence is in an advanced stage of thaw."¹⁴⁷ The dissenting opinion's explicit concession on the point means that the court is unanimous in its refusal to write into the Constitution an enforced universal deference to the law of the place of injury.

We have seen that the New York court's rationale for the *Kilberg* decision was highly vulnerable to traditional criticism in both its branches. The dissent seizes upon both weaknesses. This means

¹⁴⁵ *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962) (rehearing in banc), reversing 307 F.2d 131 (2d Cir. 1962), cert. denied, 31 U.S.L. WEEK (3259 U.S. Feb. 18, 1963).

¹⁴⁶ *Id.* at 564.

¹⁴⁷ *Id.* at 557.

that in good part it is concerned with flogging a dead horse, since the New York court had withdrawn its untenable procedural characterization. Apart from that, however, the judges of the minority, though accepting the authority of such Supreme Court decisions as *Watson v. Employers Liability Assurance Corp.*,¹⁴⁸ were unable to see any justification for "New York's invoking the Massachusetts Act as the source of the right and then transforming the right into one altogether different in nature and amount from what Massachusetts has decreed."¹⁴⁹ This is in substance, though not in terms so explicit as Judge Swan's, adherence to the Brandeis position.

Just as that position is difficult to attack when the underlying assumptions concede some inherent "applicability" to the law of the place of injury, so it is difficult to maintain when those assumptions are abandoned and New York is conceded freedom to apply its own wrongful death statute in its entirety. The objection then becomes largely conceptual; for how can the result in *Kilberg* be unconstitutional when the same result would be unobjectionable if rationalized on other grounds? Judge Friendly recognizes this difficulty. Briefly and parenthetically he suggests that conceptualism may be valuable for its own sake in a federal system—a point he apparently would not enjoy elaborating.¹⁵⁰ But "practical" considerations are adduced as well. The process of giving new dimensions to the cause of action created by the Massachusetts statute "interferes with the proper freedom of action of the legislature of the sister state."¹⁵¹ If New York may tamper with the cause of action, Massachusetts may not wish to bring it into being. As a practical consideration this has a hollow ring; lawmakers notoriously legislate with the domestic scene in mind, leaving it to the courts to puzzle out the application of local law to cases with foreign elements. But the essential fault of the reasoning is that it loses sight of the fact that New York is applying New York's own wrongful death statute, though not all of it.¹⁵² The

¹⁴⁸ 348 U.S. 66 (1954).

¹⁴⁹ 309 F.2d at 569.

¹⁵⁰ "[T]he two processes differ . . . conceptually—which may not be altogether unimportant in a legal system designed to maintain a certain degree of order among fifty states. . . ." *Id.* at 565.

¹⁵¹ *Ibid.*

¹⁵² "True, New York reiterated its partial adherence to the rule of *lex loci delictus*. But does this require that New York be deprived of any power to apply a fundamental rule of public policy to one incident of the cause of action? New York has done nothing more than to apply a traditional choice-of-law rule which designates the law of Massachusetts as the source of liability for a wrongful death. It has absorbed the Massachusetts rule into the corpus of New York law for purposes of adjudicating this

argument assumes that there would be no recovery in *Kilberg* if there were no wrongful death statute in Massachusetts. But that is inconceivable; if New York policy forbids any limitation on the amount recoverable, it certainly forbids limitation of recovery to zero. Judge Friendly's dissent should at least persuade the New York Court of Appeals that dangerous pitfalls are created by its technique of paying lip-service to traditional doctrine.

Judge Kaufman met the issue tendered by the dissent squarely and effectively. He did so, in essence, by standing firm on the ground taken by Mr. Justice Stone in *Alaska Packers*¹⁵³ in 1935, an eminence from which the Supreme Court has since retreated only once:¹⁵⁴ the Constitution does not require a state having a legitimate interest in the application of its law and policy to yield to the conflicting interest of another state; and this is true whether the forum state's policy is asserted as a defense or as a ground for affirmative relief.

The decision is a major victory for those who, at least since Walter Wheeler Cook, have struggled on the bench, at the bar, and through academic media against the shackles of traditional dogma. No doubt there will be bickering over the extent to which the decision gives aid and comfort to the respective modern efforts to formulate a better method,¹⁵⁵ but that seems relatively unimportant at this moment. The important thing is that we have all been left free to work toward a better law of conflict of laws.

case fairly. . . . We believe that in doing so New York is not bound to model *all* of the rules governing this litigation in which it is conceded it has a legitimate interest, on Massachusetts law. . . ." Kaufman, J., *Id.* at 560-61.

¹⁵³ See quotation in text *supra* note 79.

¹⁵⁴ *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

¹⁵⁵ Cf. EHRENZWEIG, *CONFLICT OF LAWS* 475 (1952), commenting on *Bernkrant v. Fowler*, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).